89-373

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE C. FREEMAN, JR.
HENRY V. NICKEL
(Counsel of Record)
MICHAEL L. TEAGUE
F. WILLIAM BROWNELL
NORMAN W. FICHTHORN
HUNTON & WILLIAMS
P.O. Box 19230
Washington, D.C. 20036
(202) 955-1500
Counsel for Petitioners
Alabama Power Company, et al.

September 6, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a federal court can order the Environmental Protection Agency to engage in notice and comment rulemaking prior to making a decision not to change existing regulations under § 109(d) of the Clean Air Act, when neither the Clean Air Act nor the Administrative Procedure Act requires notice and comment rulemaking prior to such a decision?

2. Whether the decision of the court below was correct in rejecting the decision of the District of Columbia Circuit in *Oljato Chapter of the Navajo Tribe v. Train*, by holding that a person seeking to challenge an agency's decision not to change its existing standards need not petition the agency for rulemaking and then proceed to the circuit court of appeals under § 307(b) of the Clean Air Act after a denial of the petition, but could instead bring an action in a district court under § 304 of the Clean Air Act to compel rulemaking on such standard revisions?

3. Whether the decision of the court below was correct in rejecting the decision of the District of Columbia Circuit in *Telecommunications Research and Action Center v. FCC*, which precludes district courts from asserting jurisdiction over suits seeking relief that might affect the future jurisdiction of the circuit court of appeals (in this case, the District of Columbia Circuit)?

PARTIES TO THE PROCEEDINGS

This case involves a challenge to the Environmental Protection Agency's (EPA) decision to leave in place the current national ambient air quality standards for sulfur oxides pursuant to § 109 of the Clean Air Act, 42 U.S.C. § 7409 (1982). Alabama Power Company, 59 other individual electric utilities,[1] the Edison Electric Institute, the American Public Power Association, and the National Rural Electric Cooperative Association were intervenor-appellees below, and are petitioners here. Other intervenor-appellees below were Peabody Holding Company, Inc., Peabody Coal Company, American Mining Congress, Asarco Incorporated, and Magma Copper Company.

The plaintiff-appellants below were the Environmental Defense Fund, the Natural Resources Defense Council, the Sierra Club, the National Parks and Conservation Association, the State of New York, the State of Connecticut, the State of New Hampshire, the Commonwealth of Massachusetts, the State of Vermont, and the State of Minnesota. Pursuant to Rule 19.6 of this Court, the plaintiff-appellants and the intervenor-appellees other than Alabama Power Company, *et al.*, are respondents in this Court. William K. Reilly, EPA Administrator, and EPA were defendant-appellees in the proceedings below, and are respondents here.

---

[1] A list of the individual companies that comprise Alabama Power Company, *et al.*, and all parent companies, subsidiaries and affiliates is contained in the supplemental appendix attached to this Petition pursuant to Rule 28 of this Court.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No.

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Alabama Power Company, 59 other individual electric utilities,[1] the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 22, 1989.

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals in *Environmental Defense Fund, et al. v. Thomas, et al.*, No. 88-6142 (2d Cir. March 22, 1989), is reported at 870 F.2d 892, and is reprinted in the appendix (hereinafter referred to as "App. —") at p. 1a.

The Opinion of the United States District Court for the Southern District of New York, *Environmental Defense Fund, et al. v. Thomas, et al.*, No. 85 Civ. 9507 (DNE), has not been reported. It is reprinted in the appendix at p. 22a.

---

[1] The 59 individual utility petitioners and their parent companies, subsidiaries, and affiliates are set forth in the supplemental appendix attached to the Petition pursuant to Rule 28 of this Court.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit was entered on March 22, 1989.[2] A timely Petition for Rehearing was denied on June 8, 1989, over the dissent of Judge Mahoney. App. 49a. This petition for a writ of certiorari is being filed within ninety days of that date pursuant to 28 U.S.C. § 2101(c) (1982) and Rules 20.2 and 20.4 of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are set forth in the Appendix:

1. Administrative Procedure Act § 4; 5 U.S.C. § 553 (1988), App. 51a.
2. Clean Air Act §§ 109, 304(a), 307(b), (d), (e); 42 U.S.C. §§ 7409, 7604(a), 7607(b), (d), (e) (1982), App. 52a.

---

[2] The court below heard this case on appeal from a decision of the District Court for the Southern District of New York dismissing the case for lack of jurisdiction. Plaintiffs, the Environmental Defense Fund, *et al.* (hereinafter referred to collectively as "EDF"), had asserted jurisdiction in the district court under § 304(a)(2) of the Clean Air Act, 42 U.S.C. § 7604(a)(2) (1982), which provides district courts with jurisdiction to compel the Administrator of the Environmental Protection Agency ("EPA" or "Agency") "to perform any act or duty under this Act which is not discretionary with the Administrator" and which the Administrator has "fail[ed] . . . to perform." EDF claimed that the Administrator had failed to revise the ambient standard for sulfur oxides to account for specific health and welfare effects. The district court found that revision of ambient standards is discretionary with the Administrator, and therefore not a proper subject of district court jurisdiction. The Second Circuit reversed in part, finding that even though revision of ambient standards is discretionary with the Administrator, the Administrator has a nondiscretionary duty under § 109 of the Act to determine through notice and comment rulemaking whether standard revisions are appropriate. Petitioners here disagree with the Second Circuit's creation of a nondiscretionary duty to conduct rulemaking, and believe that the lower court properly decided that it had no jurisdiction over this case.

STATEMENT OF THE CASE

This case involves a decision of the Administrator of the Environmental Protection Agency (the "Administrator") to leave in place its regulations containing the current national ambient air quality standards (NAAQS) for sulfur oxides. This decision was based on the Administrator's review of recent scientific information regarding potential health and welfare effects of emissions of sulfur oxides. Although the EPA Administrator did nothing to change the existing regulations, the Second Circuit held that his review of new scientific information must be embodied in notice and comment rulemaking procedures, and must result in a formal decision whether or not to maintain the status quo. The statutory and regulatory background of this case is summarized below.

A. The Administrative Procedure Act and the Clean Air Act

Absent an express statutory exception in the Administrative Procedure Act ("APA") or the agency's organic statute, an agency's action to promulgate or to revise rules is governed generally by the APA. The APA defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4) (1988). Under the APA, rules must be developed through notice and comment rulemaking.[3]

Apart from the APA, Congress prescribed procedures that must be followed to implement specific statutory provisions under the Clean Air Act ("CAA" or "the Act"). For example, the "*promulgation or revision* of any national ambient air quality standard under section 109" of the Act must be accompanied by development of a rulemaking docket and an opportunity for a

---

[3] 5 U.S.C. § 553 (1988). While there are specific exceptions to the rulemaking requirement, *see id.* § 553(b), these exceptions are not relevant here.

public hearing, as well as notice and an opportunity for comment.[4]

Neither the APA nor the Clean Air Act, however, prescribes procedures that EPA must follow in making the decision whether or not to revise existing regulations. For example, § 109(d)(1) of the Clean Air Act provides that the Administrator shall review the NAAQS "at five-year intervals," or "more frequently" if he chooses. If he decides, based on that review, to revise the NAAQS, he "shall make such *revisions* . . . as may be appropriate" following rulemaking.[5] Nothing in § 109(d)(1) tells the Administrator that rulemaking must precede a decision *not* to revise the NAAQS.

The Clean Air Act also addresses federal court jurisdiction over Agency action. Section 307(b)(1) of the Act assigns exclusive jurisdiction to the court of appeals to review *any* final action of the Administrator under the Act. A petition to review any national ambient air quality standard or any nationally applicable final action of the Administrator under the Act may be filed only in the Court of Appeals for the District of Columbia Circuit.[6] To emphasize the exclusivity of the jurisdiction of the court of appeals, § 307 provides that "[*n*]*othing in this Act* shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, *except as provided in this section.*" [7]

In contrast to the sweeping and exclusive jurisdiction of the courts of appeals under § 307, the jurisdiction of district courts over claims against the Administrator is

---

[4] CAA § 307(d)(1)(A), 42 U.S.C. § 7607(d)(1)(A) (1982) (emphasis added). All citations to the Clean Air Act hereinafter are to sections of the Act. The Table of Authorities contains parallel citations to the United States Code. *See also* CAA § 109 (a), (b) (requiring notice and comment procedures for promulgation and revision of ambient standards).

[5] *See id.* § 109(d)(1) (emphasis added).

[6] *Id.* § 307(b)(1).

[7] *Id.* § 307(e) (emphasis added).

limited to a narrow class of cases. Section 304(a)(2) of the Act permits a person to bring such a claim to a district court only where the Administrator has failed to perform an "act or duty which is *not discretionary* with the Administrator" (emphasis added).

B. EPA's Review of the NAAQS for Sulfur Oxides

This proceeding involves EPA's ongoing efforts to keep up to date on emerging scientific data regarding the effects of sulfur oxides on public health and welfare.

Pursuant to § 109, the EPA Administrator originally promulgated ambient standards for sulfur oxides in 1971.[8] These standards were based on a summary of available scientific data (referred to as an "air quality criteria document")[9] that addressed, *inter alia*, the possible adverse effects of this substance on the public welfare, including possible adverse effects on materials,[10] vegetation,[11] and visibility.[12]

Since the late 1970s, the Administrator has more or less continuously reviewed the air quality criteria and standards for sulfur oxides. In 1979, the EPA Administrator announced that he was reviewing, pursuant to § 109(d)(1), the scientific basis for the standards.[13] This review resulted in the completion in 1982 of a revised criteria document addressing both sulfur oxides and particulate matter, another air pollutant regulated under § 109. EPA also prepared an addendum evaluat-

---

[8] 36 Fed. Reg. 1502, 5867, 8186 (1971).

[9] *See id.* at 1502 col. 2.

[10] U.S. Dep't of Health, Educ., & Welfare, National Air Pollution Control Admin. (NAPCA), NAPCA Pub. No. AP-50, *Air Quality Criteria for Sulfur Oxides*, 51-56 (1970).

[11] *Id.* at 61-68.

[12] *Id.* at 9-15.

[13] *See* 53 Fed. Reg. 14928 col. 2 (1988); 44 Fed. Reg. 56730 col. 2 (1979).

ing additional scientific studies, and in 1984 issued the revised criteria document with the addendum.[14]

These review documents addressed, *inter alia*, acid deposition, visibility impairment, and the sources, physical and chemical properties, and possible health and welfare effects of the pollutants.[15] The EPA Administrator in 1984 decided, based on these documents, that no revision of the secondary sulfur oxides standard was appropriate.[16]

The EPA Administrator in 1984 began a further review of additional scientific data on sulfur oxides. On the basis of that review, he concluded in 1986 that revision of the secondary sulfur oxides standard was not appropriate.[17] That conclusion was later reflected in a *Federal Register* notice,[18] which observed that the current standard was "necessary and adequate" to protect against harm to vegetation,[19] and that, based on the available scientific evidence, it would not be appropriate

---

[14] *See* 53 Fed. Reg. 14928 cols. 2-3 (1988); 49 Fed. Reg. 10408 (1984).

[15] *See* 53 Fed. Reg. 14940 col. 1-14942 col. 1 (1988).

[16] *Id.* at 14929 col. 2; Defendants' Answers to First Set of Interrogatories at 11, March 6, 1986 (answers 18 and 18a) (hereinafter "Defendants' Answers"), App. 63a-67a. For example, EPA concluded in 1984 that "[a] lack of quantitative cause and effect data, in itself, defines the state of knowledge in many of the research areas" regarding acid deposition. EPA, *The Acidic Deposition Phenomenon and Its Effects: Critical Assessment Review Papers* (July 1984), Vol. II, at p. 1-1. Based on his concurrent review of information regarding the effects of sulfur oxides emissions on visibility, the Administrator explained that available information was insufficient to allow him to decide whether visibility impairment associated with fine particles was an "adverse effect" on the "public welfare," or whether the current secondary standards for particulate matter (as opposed to sulfur oxides) were not "requisite to protect" the public welfare. *See* CAA § 109(b)(2); 52 Fed. Reg. 24670-71 (1987).

[17] Defendants' Answers at 11 (answers 18 and 18a), App. 63a-67a.

[18] 53 Fed. Reg. 14926 col. 1 (1988).

[19] *Id.* at 14931 col. 2.

to revise the standard to address welfare effects such as acid deposition.[20]

In sum, the ambient standard program has been characterized by evolving scientific data and analyses. The EPA Administrator has reviewed that information more or less constantly since the late 1970s. Where the EPA Administrator has found that revisions are appropriate—as he did recently in the case of the particulate matter ambient standards—he has undertaken notice and comment rulemaking to revise the standards.[21] Where he has found no need for a change in the status quo, he typically has not undertaken rulemaking to evaluate the validity of the existing standards.[22]

C. The Proceedings Below

EPA's ongoing review of the sulfur oxides ambient standards has provided a wealth of scientific information on the potential health and welfare effects of sulfur oxides. As with any complex data, however, these data are subject to varying interpretations.

Exercising the discretion given it by Congress, EPA decided in 1984 and again in 1986, based on its review

---

[20] *Id.* at 14935 col. 3-14936 col. 2. The Administrator noted that his science advisers (the Clean Air Scientific Advisory Committee, or "CASAC") had "concluded that acidic deposition is a topic of extreme scientific complexity because of the difficulty in establishing firm quantitative relationships between emissions of relevant pollutants, formation of acidic wet and dry deposition products, and effects on terrestrial and aquatic ecosystems." *Id.* at 14935 col. 3. The Administrator also noted that CASAC had found that "acidic deposition involves, at a minimum, several different criteria pollutants—oxides of sulfur, oxides of nitrogen, and the fine particulate fraction of suspended particles." *Id.* at 14936 col. 1.

[21] *See* Revisions to the National Ambient Air Quality Standards for Particulate Matter, 52 Fed. Reg. 24634 (1987) (codified at 40 C.F.R. § 50.6 (1988)); Proposed Revisions to the National Ambient Air Quality Standards for Particulate Matter, 49 Fed. Reg. 10408 (1984).

[22] But see 53 Fed. Reg. 14926 (1988), where the Administrator solicited public comments on his most recent decision not to revise the sulfur oxides standards.

of these data, that revisions to the existing standards were not appropriate.[23] Respondent EDF disagreed with this conclusion. Rather than petitioning EPA to conduct a rulemaking to revise the existing regulations in light of EDF's interpretation of the scientific data, however, EDF in 1985 sued the Administrator in the district court under § 304(a)(2) of the Act.

1. *The District Court Suit*

EDF argued to the district court that it should (1) review the information developed by the Agency and its science advisers regarding acid deposition and visibility, (2) find that this information established adverse effects against which the current regulations do not afford protection, and (3) order the EPA Administrator to undertake rulemaking to revise the current standards to take these effects into account.[24]

In response, the district court dismissed EDF's complaint. That court noted that suits against the Administrator can be brought under § 304(a)(2) of the Act only where the Administrator has failed to perform a specific, clear-cut nondiscretionary act or duty required by the Act.[25] The court held that § 109 does *not* impose on the Administrator any nondiscretionary duty to revise the ambient standards based on his review of complex scientific data. EDF's means of relief under the Clean Air Act, therefore, would be to petition the EPA Administrator to revise the sulfur oxides standards.[26]

2. *The Second Circuit Decision*

On appeal, EDF argued that the district court was wrong in concluding that it had no jurisdiction to review

---

[23] *See supra* pp. 5-7.

[24] *See Environmental Defense Fund v. Thomas*, No. 85 Civ. 9507 (S.D.N.Y. April 19, 1988), App. 22a.

[25] *See* App. 31a.

[26] *See* App. 32a-34a & n.4, 39a-43a.

information developed by the Agency and its science advisers, and on that basis to order the Administrator to undertake rulemaking to revise the NAAQS to address acid deposition and visibility effects.[27] In response to EDF's argument, the Second Circuit held that "[a]lthough the district court does not have jurisdiction to order the Administrator to make a particular revision," it "*does have jurisdiction to compel the Administrator to make some formal decision*" regarding whether NAAQS must be revised to address the effects alleged by EDF.[28] On this basis, the Second Circuit remanded the case to the district court "to compel the Administrator to take some formal action, *employing rulemaking procedures, see Thomas v. State of New York*, 802 F.2d 1443 (D.C. Cir. 1986) [(opinion by Scalia, J.)], either revising the NAAQS or declining to revise them." [29]

The Second Circuit's decision therefore stands for the proposition that, under the Clean Air Act, district courts can review scientific data and order the Agency to engage in rulemaking based on the results of that review.[30] While district courts may not dictate whether the Agency must revise the standard, they may tell the Agency *when* to undertake rulemaking to determine the need for standard revisions and *what* the topics of that rulemaking must be (*e.g.*, in this case, rulemaking on acidic deposition and visibility).[31]

The Second Circuit based its decision in large part on its concern that to find no district court jurisdiction would "leav[e] the matter [i.e., EPA's informal decision

---

[27] *See Environmental Defense Fund v. Thomas*, 870 F.2d 892, 896 (2d Cir. 1989), App. 9a.

[28] *Id.* at 900, App. 17a (emphasis added).

[29] *Id.*, App. 18a (emphasis added).

[30] According to the panel majority, "[t]he 1982 criteria and the 1984-1985 'Critical Assessment' triggered a duty on the part of EPA to address and decide whether and what kind of revision is necessary." *Id.* at 900, App. 17a.

[31] *See id.* at 395-96, 900, App. 6a-8a, 17a.

not to revise the NAAQS for sulfur oxides] in a bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court." [32] According to the Second Circuit, EDF did not have available the alternative suggested by the district court of petitioning the Administrator for revision of the standards, because the 1977 Amendments to the Clean Air Act made a district court suit the appropriate avenue of relief.[33]

In a dissenting opinion, Judge Mahoney sharply disagreed with the panel majority. According to Judge Mahoney, "the procedure outlined in *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), [a petition to the Agency for revision of standards] was available to the plaintiffs here." [34] Under this procedure, a party seeking revision of a standard would present information justifying the revision to the Agency. In response to such a petition, the Agency might grant the petition, avoiding the need for judicial relief. If the Agency denied the petition, the U.S. Court of Appeals for the District of Columbia Circuit would have jurisdiction to review the Agency's denial.[35]

As a result, Judge Mahoney concluded that plaintiffs have a forum—the Agency—in which to present their claims regarding standard revisions. On the other hand, the Clean Air Act, he concluded, does *not* allow a district court to review evidence presented by a plaintiff and to compel the Agency to undertake a rulemaking regarding the need for standard revisions.[36]

A timely petition for rehearing was filed after the panel's decision, and was denied over Judge Mahoney's dissent. Alabama Power Company, *et al.*, now seek a

---

[32] *Id.* at 900, App. 17a.

[33] *Id.* at 897 & n.1, App. 10a-11a & n.1.

[34] *Id.* at 900-01, App. 19a.

[35] *Id.* at 901, App. 19a.

[36] *See id.* at 901-02, App. 20a-21a.

writ of certiorari from this Court to resolve the important issues of administrative law presented by this decision.

REASONS FOR GRANTING THE PETITION

Unless specifically exempted by statute, an agency must comply with the Administrative Procedure Act when it makes rules. Absent a specific requirement in its organic statute, however, an agency's adherence to rulemaking procedures is not required when the agency reexamines its existing rules and decides to leave them in place.

Congress can impose rulemaking procedures on any agency conduct that it believes merits such formality—even on the day-to-day review of new scientific information. Congress has not done so with respect to EPA's review of scientific information underlying the national ambient air quality standards and the threshold decision whether or not revisions to those standards are needed.[37]

The panel below, however, decided that whenever EPA reviews new scientific information to determine whether the Agency's current standards are up to date, the Agency must conduct notice and comment rulemaking with respect to each and every potentially adverse effect identified by the court and, as to each effect, make a formal decision either to revise the standards or to maintain the status quo. According to the Second Circuit, this duty to proceed by notice and comment rulemaking is not discretionary with the Administrator, and it can be enforced by a district court based on the plaintiff's description of potential inadequacies in the standards.

If allowed to stand, the Second Circuit's decision will frustrate agencies' ability to respond to evolving scientific information by requiring continuous rulemaking proceedings on decisions not to change agency rules. Moreover, it will place district courts at the center of the administrative process, allowing them to dictate the need for and scope of agency rulemaking in light of emerging

---

[37] *See* CAA § 109(d)(1).

scientific data, and to impose their choice of issues on which the agency must conduct rulemaking. Finally, the opinion below is in direct conflict with the decisions of the Court of Appeals for the District of Columbia Circuit in *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), and *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), and with the decisions of other circuits that have adopted these cases. The opinion below also contravenes the principles announced by this Court in its landmark decisions in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), and *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

I. The Second Circuit Decision Requiring Notice and Comment Rulemaking on Agency Decisions Not To Change Existing Regulations Is Inconsistent with This Court's Decision in *Vermont Yankee* and with Basic Principles of Administrative Law Regarding the Relationship of Federal Courts and Agencies.

In this case, the Second Circuit decided that where EPA reviews recent scientific data and decides to retain its existing regulations, district courts "have jurisdiction to compel the Administrator to take some formal action, employing rulemaking procedures," on the threshold question whether or not revisions to the regulations are needed.[38] There is no basis in either the APA or the Clean Air Act for this assertion of judicial power regarding the procedures an agency must follow in determining whether or not to change its existing regulations.

It is axiomatic that, as scientific knowledge advances, the factual and policy predicates for regulation may change. Congress recognized this and addressed it specifically in the context of the Clean Air Act. With respect to the ambient air quality standards program, Congress provided that the Administrator was to exercise his "judg-

---

[38] *Environmental Defense Fund v. Thomas*, 870 F.2d at 900, App. 18a.

ment" to establish regulations that are "requisite to protect" the public health and welfare, based on his review of relevant scientific evidence.[39]

Once regulations have been promulgated, an agency is expected to remain informed as to the evolving facts and circumstances pertinent to its regulations, and to review and to revise the regulations when it deems that appropriate.[40] Congress directed the EPA Administrator, for example, to review the basis for the NAAQS at least every five years, and to revise those standards "as appropriate." [41]

Where agencies decide to revise standards based on their review of new information, the APA and organic statutes such as the Clean Air Act require them to conduct notice and comment rulemaking.[42] An agency's informal review of evolving scientific information to determine *whether or not* to revise its existing regulations, however, is not rulemaking, just as a decision to maintain the status quo is not a "rule." [43] Thus, the fact that Congress intended agencies to keep up to date on the factual and policy predicates for their rules does not

---

[39] *See* CAA §§ 108(a), 109(b).

[40] As the D.C. Circuit has observed, EPA is

> charged with evaluating the effects of unprecedented environmental modifications, often made on a massive scale. Necessarily, they must deal with predictions and uncertainty, with developing evidence, with conflicting evidence, and sometimes, with little or no evidence at all.

Ethyl Corp. v. EPA, 541 F.2d 1, 6 (D.C. Cir.) (*en banc*), *cert. denied*, 426 U.S. 941 (1976). Given the environment in which agencies must operate, "administrative law tends to allow a great variety of factfinding procedures from which the correct one can be applied to a particular program." C. Koch, *Administrative Law and Practice* § 1.24, at 44 (1985).

[41] CAA § 109(d)(1).

[42] *See supra* pp. 3-4.

[43] A decision to maintain the status quo is not a "statement of future effect . . . designed to implement . . . law or policy"—the definition of a "rule" under the APA. 5 U.S.C. § 551(4) (1988).

mean that Congress intended agencies to conduct constant rulemaking on decisions not to change their rules.[44]

To the contrary, if there is no "rule" that changes the rights and responsibilities of regulated parties, the reasons for rulemaking (i.e., notice to parties and public comments to agencies)[45] simply are not present. Moreover, it makes little sense to burden an agency with a multitude of formal proceedings whenever the agency must keep up to date on evolving scientific and policy concerns.[46] This is especially the case where a party can seek revocation or revision of a regulation through a petition for agency action to which, under the APA, the agency must respond within a reasonable time.[47]

---

[44] *Cf. Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C. Cir. 1983) ("No regulatory scheme is perfect, and the agency's decision to refrain from amending the elaborate established regulatory scheme cannot be disturbed absent a strong showing that such action was unreasonable."); *Natural Resources Defense Council v. SEC*, 606 F.2d 1031, 1045 (D.C. Cir. 1979) ("Requiring an agency to defend in court its decision not to adopt proposed rules will divert scarce institutional resources into an area that the agency in its expert judgment has already determined is not even worth the effort already expended.").

[45] *See, e.g., Chocolate Mfrs. Ass'n of United States v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985) ("The notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking."); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980).

[46] As this Court observed in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543 (1978), administrative agencies " 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' [Citation omitted]." *See also supra* note 40.

[47] 5 U.S.C. §§ 555(b), 706(1) (1988); *see infra* note 58. On the other hand, an agency would have discretion to review evolving science through rulemaking in those cases where it thought this type of procedure would be beneficial. *See supra* notes 40 & 46. Thus, that EPA has solicited comments with respect to the adequacy of the existing sulfur oxides standards, *see supra* note 22,

Requiring the EPA Administrator to conduct notice and comment rulemaking for a decision not to revise a regulation flatly contradicts the well-established principle that rulemaking procedures are required *only* for substantive rules that change existing law or policy.[48] In this regard, the definition of a substantive rule that triggers rulemaking requirements is already the subject of some confusion among the circuits.[49] The Second Circuit decision will create further confusion among the circuits

---

does not mean that it must conduct rulemaking in every case where it reviews the adequacy of its existing standards. Nor does it mean that the Agency must complete rulemaking on every issue on which it has solicited comments.

[48] *See* Senate Committee on the Judiciary, 79th Cong., 2d Sess., *Administrative Procedure Act—Legislative History* at 18, 19 (1946). Section 552 requires notice for "substantive" rules. 5 U.S.C. § 552(a)(1)(D) (1988). The legislative history of the APA states that § 553 rulemaking procedures apply "only to the type of rules for which notice is required by []section [552] . . . —that is, substantive rules." *Id.* at 19. *See also Guadamuz v. Bowen*, 859 F.2d 762, 771 (9th Cir. 1988) (No rulemaking requirement exists if a rule "does not change any existing law or policy, . . . [or] remove any previously existing right of claimants or their attorneys."); *Brecker v. Queens B'nai B'rith Housing Development Fund Co., Inc.*, 798 F.2d 52, 56 (2d Cir. 1986) (No publication requirement exists where the agency action "did not constitute a change in [the agency's] position."); *General Motors v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985) (Rulemaking is not required because "the rule did not create any new rights or duties; instead, it simply restated the consistent practice of the agency.").

[49] The definition of a substantive rule has evolved through case law. Frustrated courts have described the resulting law on when a rule is subject to rulemaking proceedings as "enshrouded in considerable smog," *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975), or "akin to wandering lost in the Serbonian bog," *Jean v. Nelson*, 711 F.2d 1455, 1480, *reh'g granted*, 714 F.2d 96 (11th Cir. 1983). For a summary of the numerous approaches adopted by courts to defining a substantive rule, *see* Annotation, *Exceptions Under 5 USC § 553(b)(A) and § 553(b)(B) to Notice Requirements of Administrative Procedure Act Rule Making Provisions*, 45 A.L.R. FED. 12 (1979).

as to when rulemaking is required by the Administrative Procedure Act.[50]

Moreover, by expanding the rulemaking requirement, the Second Circuit decision is directly contrary to this Court's teaching in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,[51] as to the proper relationship between courts and agencies on questions of agency procedure. Since neither the Clean Air Act nor the APA requires EPA to conduct notice and comment rulemaking when it decides to maintain the status quo, a court may not impose such a requirement on the EPA Administrator.[52] Certiorari should be granted to clarify

---

[50] In this regard, the Second Circuit cited then-Judge Scalia's opinion for the court in *Thomas v. State of New York*, 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987), in finding that rulemaking procedures must be employed here. *Environmental Defense Fund v. Thomas*, 870 F.2d at 900, App. 18a. That opinion has no relevance here. It holds only that if an agency wants to bind itself to take discretionary action in the future, it can do so only through rulemaking. *See* 802 F.2d at 1447.

[51] 435 U.S. at 544. *Cf. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983); *Robertson v. Methow Valley Citizens Council*, 490 U.S. ——, 104 L.Ed.2d 351 (1989).

[52] In this regard, the Second Circuit's decision is also inconsistent with the basic thrust of this Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, a reviewing court looks first to "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In the instant case, there is nothing in the language or legislative history of the Clean Air Act that speaks directly to whether the agency is required to undertake notice and comment rulemaking on a decision not to revise an ambient air quality standard. The question for the court, therefore, should have been whether the agency's construction of the statute was a permissible one. The Second Circuit, however, did just what this Court instructed it *not* to do, and "simply [imposed] its own construction of the statute" on the Agency. *Id. See Environmental Defense Fund v. Thomas*, 870 F.2d at 897-98 n.1 ("We believe that the

the applicability of *Vermont Yankee* where agencies decide to maintain the status quo.[53]

Beyond creating new rulemaking obligations for agencies, the Second Circuit decision gives the district courts an unprecedented role with respect to implementation of the Clean Air Act. That is, this decision allows district courts to tell the Agency when and under what terms it must conduct rulemaking regarding new scientific data based on the court's review of documents such as "[t]he 1982 criteria and the 1984-1985 'Critical Assessment.'" [54]

Congress' grant of jurisdiction to district courts under § 304(a)(2) of the Clean Air Act, however, is "undisputedly limited" [55] and "narrowly defined." [56] By allowing petitioners to bypass the agency and to argue to a district court that new information on an alleged potential effect creates a nondiscretionary duty for the agency to

---

'specified action' under this section is the making of *some* decision . . . . To the extent that the 'specified action' is simply the making of *some* decision," district court jurisdiction would exist.) (emphasis in original), App. 12a.

[53] In *Batterton v. Marshall*, 648 F.2d 694, 709 (D.C. Cir. 1980), the D.C. Circuit held that *Vermont Yankee* constrained a reviewing court from requiring procedures beyond those set forth in § 553, but did not limit a court's power to require § 553 procedures in a case where the statute was silent as to whether rulemaking procedures were intended by Congress. This is the only interpretation of *Vermont Yankee* that might support the Second Circuit's decision in the instant case. It is, however, an unwarranted narrowing of the broad principle established in *Vermont Yankee* that a reviewing court should defer to an agency's choice of procedures, provided the agency has "employed at least the statutory minima." 435 U.S. at 548. This Court should grant certiorari to clarify the extent of the principle enunciated in *Vermont Yankee*.

[54] *See Environmental Defense Fund v. Thomas*, 870 F.2d at 900, App. 17a.

[55] *Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987).

[56] *Wisconsin Environmental Decade, Inc. v. Wisconsin Power and Light Co.*, 395 F. Supp. 313, 321 (W.D. Wis. 1975).

conduct rulemaking on that potential effect,[57] the Second Circuit decision violates the separation of powers principle. That is, it would permit federal courts, rather than the agencies to which Congress has delegated primary jurisdiction to administer the Act, to dictate rulemaking based on the courts' review of evolving scientific data.[58]

In sum, by creating new rulemaking obligations governing agency review of evolving scientific data and by giving district courts a central role in the administrative process, the Second Circuit decision represents an abrupt departure from the traditional rules governing agency action and conflicts with the decisions of other circuits and of this Court. For these reasons, it is important that certiorari be granted to address this decision.

---

[57] As Judge Mahoney explains, the majority opinion concluded that a formal decision whether to revise the standard was required "[i]n view of" a revised criteria document and other new information the agency had produced. *See Environmental Defense Fund v. Thomas*, 870 F.2d at 901 n.2 (Mahoney, J., dissenting). Under the majority's decision, therefore, district courts would review the merits of a request for rulemaking in deciding whether a nondiscretionary duty to act exists. This newly created district court jurisdiction will create uncertainty for agencies that must act in light of evolving scientific data.

[58] The Supreme Court has long admonished the judiciary to respect "the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon courts under Article 3 of the Constitution," noting that federal courts possess only a limited supervisory province as to agencies. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940). *See also Carpet, Linoleum and Resilient Tile Layers v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981) ("to the extent a statute vests discretion in a public official, his exercise of that discretion should not be controlled by the judiciary. The doctrine of separation of powers precludes the judiciary's arrogation of authority as a 'super agency' controlling or overseeing the discretionary affairs of an agency"); *Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1180 (D.C. Cir. 1979) (Leventhal, J., concurring), *cert. denied*, 447 U.S. 921 (1980).

II. The Second Circuit Decision Conflicts with Decisions of Other Circuits as to the Permissible Means for Seeking Revision of Existing Regulations, and for Obtaining Judicial Review of EPA Decisions Not To Conduct Rulemaking on the Adequacy of Existing Regulations.

The Second Circuit's decision to require notice and comment rulemaking reflected the majority's belief that if the Agency were not required to make a formal decision through rulemaking that its existing standards are adequate, the adequacy of those standards would be left "in a bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court." [59] Granting a district court jurisdiction to order rulemaking was necessary, the court believed, to force the Agency to take final action that would be reviewable in the D.C. Circuit under § 307 of the Act.[60]

The Second Circuit's conclusion that, without district court jurisdiction, plaintiffs would have no forum to air their claims is inconsistent with the law of other circuits, and will disrupt the administrative process by allowing judicial review before the agency has had an opportunity to develop an administrative record.

When the EPA Administrator promulgates regulations under the Clean Air Act, those regulations are subject to judicial challenge within 60 days after promulgation, unless the grounds for review arise after the expiration of this period.[61] The review takes place within the confines of the record developed by the agency.[62] Reflecting the primary jurisdiction that Congress granted agencies to resolve complex, technical questions, the record on judicial review must reflect the agency's response to the

---

[59] *Environmental Defense Fund v. Thomas*, 870 F.2d at 900, App. 17a.

[60] *Id.*

[61] CAA § 307(b)(1).

[62] *See, e.g., PPG Industries, Inc. v. Costle*, 659 F.2d 1239, 1241 (D.C. Cir. 1981).

arguments of those seeking review, as well as the agency's explanation of its action.[63]

Principles of primary jurisdiction and the need for an administrative record for a court to exercise its judicial review function preclude parties from seeking post-sixty-day judicial review on the basis of information and arguments not presented to the agency in a petition for rulemaking. This requirement was originally enunciated by the D.C. Circuit in *Oljato Chapter of the Navajo Tribe v. Train.*[64] The Second Circuit, however, concluded in the present case that the *Oljato* procedure is not available under the Clean Air Act in the wake of the 1977 Amendments to the Act. In the words of the panel majority, the *Oljato* procedure is only "dictum" and in any event is "obsolete" after those Amendments.[65]

As Judge Mahoney recognized in his dissent, however, the *Oljato* court's holding that the petition for rulemaking procedure was mandatory was not dictum.[66] Furthermore, contrary to the assertion of the panel majority, the *Oljato* procedure was endorsed, not rejected, by Congress when it amended the Act in 1977.[67]

---

[63] *See* CAA § 307(d)(6).

[64] 515 F.2d 654 (D.C. Cir. 1975).

[65] *Environmental Defense Fund v. Thomas*, 870 F.2d at 897 n.1, App. 11a n.1.

[66] *Id.* at 900-01 & n.1 (Mahoney, J., dissenting), App. 19a-20a & n.1. Indeed, this procedure was "mandated" by the D.C. Circuit and therefore was not dictum. The petition for review in *Oljato* was dismissed specifically for failure to follow that procedure. 515 F.2d at 668.

[67] The Second Circuit was plainly wrong when it held that the *Oljato* procedure was made obsolete when Congress enacted § 109(d) as part of the 1977 Clean Air Act Amendments. Nothing in the language of the 1977 Amendments supports the Second Circuit's holding. Moreover, the House report accompanying the House bill that proposed to add § 109(d) explicitly states that "the committee bill confirms the court's decision in *Oljato*." H.R. Rep. No. 294, 95th Cong., 1st Sess. 323 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News 1077, 1402.

As a result, other circuits have explicitly adopted the *Oljato* scheme *subsequent to* the 1977 Clean Air Act Amendments. *See, e.g., Group Against Smog and Pollution, Inc. v. U.S. EPA*, 665 F.2d 1284, 1290 (D.C. Cir. 1981) (The *Oljato* scheme is "explicitly endorsed."); *State of Maine v. Thomas*, 874 F.2d 883, 889-90 (1st Cir. 1989) ("We approve the procedures suggested" by the "entrenched precedent" of the *Oljato* decision.); *Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 812 (9th Cir. 1980) (Kennedy, J.). Indeed, the Second Circuit is the *only* court to reject application of this doctrine.

The *Oljato* decision confirms that Congress, in granting district courts jurisdiction under § 304 of the Act to compel nondiscretionary duties, did *not* change the basic procedure for obtaining review of the adequacy of existing standards. That is, a petitioner must seek standard revisions from the agency.[68] Judicial relief with respect to the adequacy of existing standards (and consequently the obligation of an agency to conduct rulemaking on the adequacy of those standards) is appropriate only in the D.C. Circuit after the Agency has had an opportunity to act on a petition for rulemaking, and not in the district court before a petition is filed.[69]

---

[68] Each agency is required by the APA to provide a mechanism for interested persons to petition for the issuance, amendment, or repeal of a rule, and to give prompt notice of a denial of such a petition. 5 U.S.C. §§ 553(e), 555(e) (1988). As the *Oljato* court recognized, the rulemaking petition procedures mandated by the D.C. Circuit in *Oljato* simply reflect the APA requirements. *Oljato*, 515 F.2d at 666.

[69] *See* CAA §§ 307(b)(1), 307(e). It is well established that an adequate record for review of a denial of a rulemaking petition is created by the rulemaking petition and the agency's explanation of its decision on the petition. *See WWHT, Inc. v. FCC*, 656 F.2d 807, 817-18 (D.C. Cir. 1981); *United States Brewers Ass'n, Inc. v. EPA*, 600 F.2d 974, 979 (D.C. Cir. 1979). *See also* W. Rodgers, 1 *Environmental Law: Air and Water* § 3.4, at 209 (1986) (An agency's rejection of a rulemaking petition under the *Oljato* procedure will "be deliberate, informed, with reasons laid out as would be the case where action is taken.").

Rejecting the *Oljato* procedure, as the Second Circuit has done, would leave courts with no record on which to review the need for rulemaking on standard revisions, and with no agency decision to use in evaluating that record. Rather, allegations of a plaintiff would form the basis for review and for an order compelling rulemaking.[70] Facts alleged by a plaintiff based on its view of evolving science are simply not a substitute for a record developed by an agency in response to a rulemaking petition.

For these reasons, the Second Circuit's rejection of *Oljato* conflicts with the law of other circuits, and will create confusion as to how to gain review of the adequacy of existing regulations. This Court should grant certiorari to resolve this conflict.

III. Requiring Agencies To Follow Rulemaking Procedures Before Making a Decision To Maintain Existing Regulations Will Frustrate Implementation of the Clean Air Act and Similar Regulatory Statutes, and Will Conflict with the D.C. Circuit's Decision in *Telecommunications Research and Action Center v. FCC.*

Agencies charged with implementing complex statutory provisions of necessity review the scientific predicates for their regulatory decisions on a periodic basis.[71] Such review may lead to the revision of standards, in which case the agency undertakes rulemaking. On the other hand, the review may result in a decision to maintain the status quo, and no rulemaking will take place.

As discussed above, the Second Circuit decision would change how agencies operate in the face of evolving science. Rather than permitting the agency the flexibility needed to review changing information on an informal basis, the Second Circuit decision would require the agency to undertake rulemaking to address alleged potential in-

---

[70] *See supra* notes 30, 57.

[71] *See supra* pp. 12-13.

adequacies identified by a district court. For the following reasons, this approach would disrupt the implementation of the Clean Air Act and similar regulatory statutes.

Under the Second Circuit decision, an agency would no longer be able to monitor new information as it arises, and engage in rulemaking only when it concludes that new information justifies regulatory changes. Rather, the agency would be required to engage in rulemaking prior to each determination that a revision of the existing standards is not warranted. The amount of rulemaking required under this decision would place an impossible burden on agencies, especially in light of the many important rulemaking obligations already confronting agencies such as EPA.[72]

This Court has consistently counseled against judicial intrusion into an agency's ordering of its priorities.[73] By radically expanding the rulemaking obligations of agencies, this decision will cause precisely the result against which this Court has cautioned.

Besides imposing substantial new and unnecessary rulemaking burdens on agencies, this decision will lead to jurisdictional conflicts regarding implementation of complex regulatory programs. Recognizing the potential of district court jurisdiction to disrupt the agency's im-

---

[72] Requiring repetitive rulemaking on decisions not to revise existing standards would detract from agencies' performance of these obligations.

[73] *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."); *Heckler v. Day*, 467 U.S. 104, 116 (1984). *See also, e.g., Natural Resources Defense Council v. SEC*, 606 F.2d at 1056 (The agency "alone is cognizant of the many demands on it, its limited resources, and the most effective structuring and timing of proceedings to resolve those competing demands. An agency is allowed to be master of its own house, lest effective agency decisionmaking not occur in *any* proceeding; and judicial review awaits the agency's conclusion of its proceedings.") (emphasis in original).

plementation of the Act, Congress created district court jurisdiction under § 304 only in situations where the Administrator has failed to carry out a duty clearly required on the face of the statute.[74] By contrast, circuit court jurisdiction under the Clean Air Act is broadly defined to cover "any . . . final action" of the Administrator.[75]

To avoid conflicts between district court jurisdiction and court of appeals jurisdiction with respect to agency regulations, the D.C. Circuit and the Ninth Circuit have adopted an explicit rule that "any suit seeking relief that might affect the Circuit Court's future jurisdiction [to

---

[74] *See, e.g., A Legislative History of the Clean Air Amendments of 1970* (Comm. Print, Senate Comm. on Public Works (1974)) (Serial No. 93-18) at 112 ("[C]itizen suits against the Administrator will be limited to those duties which are mandatory under the legislation and the suits will not extend to those areas of enforcement with regard to which the Administrator has discretion.") (statement of Sen. Staggers); *id.* at 147 ("[S]uits against the Administrator of the Environmental Protection Agency are limited to actions in which there is an alleged failure by the Administrator to perform mandatory duties imposed by the statute.") (statement of Sen. Spong).

Consisent with the language of the statute and the Act's legislative history, § 304 jurisdiction has been limited by other circuits to enforcing mandatory duties that are clear on the face of the statute. *See, e.g., Sierra Club v. Thomas*, 828 F.2d at 792 (Section 304 cannot be used to enforce a duty "merely inferred from the overall statutory scheme."); *State of Maine v. Thomas*, 874 F.2d at 888 n.7 (Even nondiscretionary duties are not reviewable under § 304 unless they are "statutory nondiscretionary duties.") (emphasis added); *City of Seabrook v. Costle*, 659 F.2d 1371, 1374, *reh'g denied*, 665 F.2d 347 (5th Cir. 1981) (requiring "a clear statutory mandate" to impose a nondiscretionary duty on the Administrator); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980), *cert. denied*, 450 U.S. 1050 (1981) (Section 304 jurisdiction is restricted to "actions seeking to enforce specific non-discretionary clear-cut requirements of the Act.").

[75] CAA §§ 307(b)(1); *see also id.* § 307(e) ("Nothing in this Act shall be construed to authorize judicial review of regulations or orders . . . except as provided in this section.").

review agency actions] is subject to the *exclusive* review of the Court of Appeals." [76] The D.C. Circuit has held that the rule of preclusive court of appeals jurisdiction enunciated in *TRAC* applies to cases under the Clean Air Act, thereby confirming that the jurisdiction of district courts under the Act is extremely narrow.[77]

In the instant case, by contrast, the Second Circuit has held that a district court may review facts alleged by a plaintiff and order an agency to conduct rulemaking based on the plaintiff's reading of those facts.[78] This kind of district court review of scientific data to compel final agency action after rulemaking will result in the jurisdictional conflict that the *TRAC* rule seeks to avoid.[79] As Judge Mahoney pointed out, therefore, the Second Circuit's decision *directly contradicts* the *TRAC* rule adopted by the D.C. Circuit and the Ninth Circuit.[80]

In sum, the Second Circuit decision will hinder implementation of the Clean Air Act and similar regulatory

---

[76] *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("*TRAC*") (emphasis in original). The D.C. Circuit noted that "this part of our decision has been considered separately and approved by the whole court, and thus constitutes the law of the circuit." *Id.* at 75 n.24. The Ninth Circuit adopted the rule in TRAC, in an opinion by then-Judge Kennedy, in *Public Utility Commissioner of Oregon v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985).

[77] *Sierra Club v. Thomas*, 828 F.2d at 787-93.

[78] *See supra* notes 30, 57.

[79] *See TRAC*, 750 F.2d at 74-75.

[80] *See Environmental Defense Fund v. Thomas*, 870 F.2d at 901-02, App. 21a. Indeed, *TRAC* has been applied to deny district court jurisdiction in cases directly comparable to the instant case in which the relief sought was a district court order compelling an agency to make a final order that would be subject to exclusive appellate review. *See, e.g., Oil, Chemical & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1483 (D.C. Cir. 1985); *Independent Bankers Ass'n of America v. Conover*, 603 F. Supp. 948, 956-57 (D.D.C. 1985).

statutes. Certiorari should be granted to avoid these problems and to resolve the conflict with the *TRAC* rule adopted by the D.C. Circuit and the Ninth Circuit.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

GEORGE C. FREEMAN, JR.
HENRY V. NICKEL
(Counsel of Record)
MICHAEL L. TEAGUE
F. WILLIAM BROWNELL
NORMAN W. FICHTHORN
HUNTON & WILLIAMS
P.O. Box 19230
Washington, D.C. 20036
(202) 955-1500
Counsel for Petitioners
Alabama Power Company, et al.

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX

PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES OF INDIVIDUAL ELECTRIC UTILITIES

(Asterisk indicates an inactive entity.)

Alabama Power Company
(subsidiary of The Southern Company)

subsidiaries:

Alabama Property Company
Columbia Fuels, Inc.

affiliate:

Southern Electric Generating Company

Appalachian Power Company
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Central Appalachian Coal Company
Kanawha Valley Power Company
Southern Appalachian Coal Company
West Virginia Power Company
Cedar Coal Company

affiliates:

Central Coal Company
Central Operating Company
Ohio Valley Electric Corporation

Baltimore Gas and Electric Company

subsidiaries:

B&G, Inc.
Safe Harbor Water Power Corp.
Constellation Holdings, Inc.

subsidiaries:

Constellation Biogas, Inc.
Constellation Investments, Inc.
Constellation Properties, Inc.
Constellation Development, Inc.
Constellation Operating Services, Inc.
Constellation Real Estate Group, Inc.
Constellation Water Systems, Inc.

Boston Edison Company

Carolina Power and Light Company

subsidiaries:

Capitan Corporation
Carolina Power & Light Finance, N.V.
Leslie Coal Mining Company
McInnes Coal Mining Company

affiliate:

Carolinas-Virginia Nuclear Power Associates, Inc.

Central and South West Corporation

subsidiaries:

Central Power and Light Company
Public Service Company of Oklahoma

subsidiary:

Ash Creek Mining Company

Transok, Inc.
Southwestern Electric Power Company
West Texas Utilities Company
Central and South West Services, Inc.
CSW Financial, Inc.
CSW Energy, Inc.

CSW Leasing, Inc.
CSW Credit, Inc.

Central Hudson Gas and Electric Corporation

subsidiaries:

Phoenix Development Company, Inc.
Greene Point Development Corporation
Central Hudson Enterprsies Corporation
CH Resources, Inc.
CH Cogeneration, Inc.

Central Illinois Light Company
(a subsidiary of CILCORP, Inc.)

subsidiaries:

CILCO Exploration and Development Company
CILCO Energy Corporation

Central Illinois Public Service Company

affiliate:

Electric Energy, Inc.

Central Power and Light Company
(controlled by Central and South West Corporation)

The Cincinnati Gas and Electric Company

subsidiaries:

Union Light, Heat and Power Company
West Harrison Gas & Electric Company
Miami Power Corporation
Lawrenceburg Gas Company
Lawrenceburg Gas Transmission Corporation
Tri-State Improvement Company
YGK, Inc.

affiliate:

Ohio Valley Electric Corporation

Cleveland Electric Illuminating Company
(controlled by Centerior Energy Corporation)

subsidiaries:

CEICO Company
CCO Company
Dynamic Energy Ventures, Inc.

Columbus Southern Power Company
(formerly Columbus and Southern Ohio Electric Company)
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Colomet, Inc.
Simco, Inc.
Conesville Coal Preparation Company

Commonwealth Edison Company

subsidiaries:

Commonwealth Edison Company of Indiana, Inc.
Chicago and Illinois Midland Railway Company
Cotter Corporation
Commonwealth Research Corporation
Edison Development Canada, Inc.
Edison Development Company
Concomber, Ltd.

Consoliated Edison Company of New York, Inc.

Consumers Power Company
(controlled by CMS Energy Corporation)

subsidiaries:

Michigan Gas Storage Company
Northern Michigan Exploration Company

Selective Collection Services, Inc.
Utility Systems, Inc.
Huron Hydrocarbons, Inc.
Jackson Partners, Ltd.
Midland Group, Ltd.

CMS Midland, Inc.
MEC Development Corporation

Plateau Resources, Ltd.

Canyon Homesteads, Inc.

The Dayton Power and Light Company
(controlled by DPL, Inc.)

subsidiaries:

DP&L Commuity Urban Redevelopment Corporation
Miami Valley Development Company

affiliate:

Ohio Valley Electric Corporation

Delmarva Power & Light Company

subsidiaries:

Delmarva Industries, Inc.
Delmarva Services Company
Delmarva Capital Investments, Inc.

subsidiaries:

DCI I, Inc.
DCI II, Inc.
Delmarva Capital Technology, Inc.
Delmarva Capitol Realty Company

Peach Bottom Generating Station

The Detroit Edison Company

subsidiaries:

Edison Illuminating Company of Detroit
Midwest Energy Resources Company

Washtenaw Energy Corporation
St. Clair Energy Corporation
SYNDECO, Inc.

subsidiaries:

SYNDECO Realty Corporation
Utility Technical Services Inc.

Duke Power Company

subsidiaries:

Mill-Power Supply Company
Crescent Land & Timber Corporation
Wateree Power Company*
Catawba Manufacturing and Electric Power Company*
Western Carolina Power Company*
Caldwell Power Company*
Southern Power Company*
Greenville Gas and Electric Light and Power Company
Church Street Capital Corporation
Duke Engineering and Services
Nantahala Power & Light Company

Florida Power & Light Company
(wholly-owned subsidiary of FPL Group, Inc.)

subsidiaries:

Land Resources Investment Company
FPL QualTec, Inc.
Alandco, Inc.

Georgia Power Company
(subsidiary of The Southern Company)

subsidiary:

Piedmont Forrest Company

affiliate:

Southern Electric Generating Company

Gulf Power Company
(subsidiary of The Southern Company)

Illinois Power Company

subsidiaries:

IP, Inc.
IPF Company, N.V.
Illinois Power Fuel Company
IP Gas Supply Company

affiliate:

Electric Energy, Inc.

Indiana Michigan Power Company
(formerly Indiana & Michigan Electric Company)
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Price River Coal Company, Inc.
Blackhawk Coal Company

Indianapolis Power & Light Company
(controlled by IPALCO Enterprises, Inc.)

Iowa Public Service Company
(controlled by Midwest Energy Company)

Kansas City Power and Light Company

subsidiary:

WYMO Fuels, Inc.

affiliate:

Utility Fuels, Inc.

Kentucky Power Company
(controlled by American Electric Power Company, Inc.)

Kentucky Utilities Company

subsidiary:

Old Dominion Power Company

affiliates:

Electric Energy, Inc.
Ohio Valley Electric Corporation

Madison Gas and Electric Company

subsidiaries:

MG&E Nuclear Fuel Inc.
MAGAEL Inc.
MAGAEL Material Resources, Inc.
MAGAEL Communications, Inc.
Waters and Associates
Central Wisconsin Development Corporation
Wisconsin Resources Corporation
North Central Technologies, Inc.
Mid-America Technologies, Inc.

Mississippi Power Company
(subsidiary of The Southern Company)

Monongahela Power Company
(controlled by Allegheny Power System, Inc.)

affiliates:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company
Ohio Valley Electric Company

Northern Indiana Public Service Company
(wholly owned by NIPSCO Industries, Inc.)

subsidiaries:

Shore Line Shops, Inc.
NIPSCO Exploration Company

NIPSCO Fuel Company, Inc.
NIPSCO Energy Services, Inc.

Ohio Edison Company

subsidiaries:

Pennsylvania Power Company
Ohio Edison Finance, N.A.
OES Fuel, Inc.
OES Capital, Inc.

Ohio Power Company
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Central Ohio Coal Company
Southern Ohio Coal Company
Windsor Coal Company

affiliates:

Central Operating Company
Central Coal Company
Cardinal Operating Company
Ohio Valley Electric Corporation

Ohio Valley Electric Corporation

subsidiary:

Indiana-Kentucky Electric Corporation

Oklahoma Gas and Electric Company

subsidiary:

Enoyex Inc.

affiliate:

Arklahoma Corporation

Pacific Gas & Electric Company

subsidiaries:

Natural Gas Corporation Energy Company

subsidiary:

NGC Production Company

Gas Lines, Inc.
Alberta & Southern Gas Company, Ltd.
Calaska Energy Company
Standard Pacific Gas Lines, Inc.
Pacific Gas Transmission Company

affiliates:

ANGUS Biotech
ANGUS Chemical Company
ANGUS Petroleum Corporation
Alberta Natural Gas Company, Ltd.

affiliates:

ANGUS Biotech
ANGUS Chemical Company
ANGUS Petroleum Corporation
Foothills Pipelines

Alaska California LNG Company
Eureka Energy Company
Mission Trail Insurance (Cayman), Ltd.
Pacific Gas LNG Terminal Company
Pacific Gas Marine Company
Pacific Gas & Electric Gas Supply Company
JWP Land Company
Pacific Gas and Electric Finance Company, N.V.
Alberta Natural Gas Company, Ltd.
Pacific Conservation Services Company
Pacific Horizon Enterprises, Inc.

subsidiaries:

Pacific Energy Services Company
Pacific Transmission Supply Company
Rocky Mountain Gas Transmission Company

Pennsylvania Electric Company
(subsidiary of General Public Utilities Corporation)

subsidiaries:

Nineveh Water Company
The Waverly Electric Light & Power Company

Pennsylvania Power Company
(controlled by Ohio Edison Company)

Pennsylvania Power & Light Company

subsidiaries:

Pennsylvania Coal Resources Corporation

subsidiaries:

Brush Valley Coal Corporation*
Rushton Mining Company
Tunnelton Mining Company
Pemico Incorporated*
Pennsylvania Mines Corporation

CEP Group, Inc.

subsidiary:

Hanover Development Corporation

Interstate Energy Company
Realty Company of Pennsylvania

subsidiaries:

BDW Corporation
LCA Leasing Corporation
Lady Jane Collieries, Inc.
Greene Manor Coal Company
Greene Hill Coal Company

affiliate:

Safe Harbor Water Power Corporation

The Potomac Edison Company
(controlled by Allegheny Power System, Inc.)

affiliates:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company

Potomac Electric Power Company

subsidiaries:

PEPCO Enterprises, Inc.

subsidiary:

Energy Use Management Corporation

Potomac Capital Investment Corporation
PCI Energy Corporation

Public Service Company of Indiana, Inc.
(wholly-owned by PSI Holdings, Inc.)

subsidiary:

South Construction Company, Inc.

Public Service Company of Oklahoma
(controlled by Central & South West Corporation)

subsidiary:

Ash Creek Mining Company

Public Service Electric and Gas Company
(controlled by Public Service Enterprise Group, Inc.)

subsidiaries:

PSE&G Research Corporation
Mulberry Street Urban Renewal Corporation

Salt River Project

Southern California Edison Company
(controlled by SCE Corporation)

subsidiaries:

Associated Southern Investment Company
Energy Services, Inc.
Southern Surplus Realty Company
Calabasas Park Company, Inc.
Mono Power Company

subsidiaries:

Bear Creek Uranium Company
Mono Green Mountain Company

S.C.E. Capital Company
(a subsidiary of Southern California Edison Finance Company, N.V.)
Mission Energy Company
Mission Land Company
Northern Cimarron Resources Company
Mission Financial Management Company
Southern States Realty Company
California Electric Power Company
Conservation Financing Corporation

Southwestern Electric Power Company
(controlled by Central & South West Corporation)

affiliate:

The Arklahoma Corporation

Tampa Electric Company
(controlled by TECO Energy, Inc.)

Toledo Edison Company
(controlled by Centerior Energy Corporation

affiliate:

Ohio Valley Electric Company

Tucson Electric Power Company

subsidiaries:

Valencia Energy Company
Escavada Leasing Company
Tucson Resources, Inc.
Tusconel, Inc.
Sierrita Resources, Inc.
San Carlos Resources, Inc.
Santa Clara Resources, Inc.
Santa Rosa Resources, Inc.
Palomas Securities, Inc.
LRCS L.P.
Catalina Securities, Inc.
Gallo Wash Development Company
Pantano Securities, Inc.
Rincon Blue Lake, Inc.
Rincon Investing Company
Katrena Corporation
Kingswood Partee Association
Stockton Gogen (III) Inc.
Sabino Investing, Inc.
Santa Cruz Resources, Inc.
Santa Rita Energy, Inc.
Santa Rita Jonesboro, Inc.
Santa Rita West Enfield, Inc.

Union Electric Company

subsidiary:

Union Colliery Company

affiliate:

Electric Energy, Inc.

Virginia Power
(formerly Virginia Electric and Power Company)
(controlled by Dominion Resources, Inc.)

subsidiaries:

Laurel Run Mining Company
Dominion Exploration, Inc.

West Penn Power Company
(controlled by Allegheny Power System, Inc.)

subsidiary:

West Virginia Power & Transmission Company

subsidiary:

West Penn West Virginia Water Power Company

affiliates:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company
Ohio Valley Electric Company

West Texas Utilities Company
(controlled by Central & South West Corporation)

Wisconsin Electric Power Company
(controlled by Wisconsin Energy Corporation)

Wisconsin Power and Light Company
(wholly owned by WPL Holdings, Inc.)

subsidiaries:

South Beloit Water, Gas and Electric Company
Wisconsin Power and Light Nuclear Fuel, Inc.
NUFUS Resources, Inc.
Residuals Maangement Technology, Inc.
ENSERV, Inc.

REAC, Inc.
WP&L Holdings, Inc.
WP&L Communications, Inc.

affiliates:

Wisconsin Public Service Corporation
Consolidated Water Power & Paper Company
Wisconsin River Power Company

Wisconsin Public Service Corporation

subsidiaries:

Delores Bench General Partner, Inc.
WPS Development, Inc.
WPS Communications, Inc.

affiliates:

Wisconsin River Power Company
Wisconsin Valley Improvement Company
Wisconsin Power & Light Company
Consolidated Papers, Inc.
Utech Ventures Capital

(2)

89-373

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE C. FREEMAN, JR.
HENRY V. NICKEL
(*Counsel of Record*)
MICHAEL L. TEAGUE
F. WILLIAM BROWNELL
NORMAN W. FICHTHORN
HUNTON & WILLIAMS
P.O. Box 19230
Washington, D.C. 20036
(202) 955-1500
Counsel for Petitioners
Alabama Power Company, et al.

September 6, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

69p

APPENDIX
TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 475—August Term, 1988

(Argued November 30, 1988 Decided March 22, 1989)

Docket No. 88-6142

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NATIONAL PARKS AND CONSERVATION ASSOCIATION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW HAMPSHIRE, COMMONWEALTH OF MASSACHUSETTS, STATE OF VERMONT, STATE OF MINNESOTA, and STATE OF RHODE ISLAND,

Plaintiffs,

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NATIONAL PARKS AND CONSERVATION ASSOCIATION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW HAMPSHIRE, COMMONWEALTH OF MASSACHUSETTS, STATE OF VERMONT, STATE OF MINNESOTA,

Plaintiffs-Appellants,

—v.—

LEE M. THOMAS, Administrator of the U.S. Environmental Protection Agency, and the U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellees,

ALABAMA POWER COMPANY, et al., PEABODY HOLDING COMPANY, INC., PEABODY COAL COMPANY, CONSOLIDATION COAL COMPANY, AMERICAN MINING CONGRESS, ASARCO INCORPORATED, MAGMA COPPER COMPANY,

Intervenors-Appellees.

Before:

VAN GRAAFEILAND, WINTER and MAHONEY,
Circuit Judges.

Appeal from a decision of the United States District Court for the Southern District of New York (David N. Edelstein, *Judge*), holding that Section 304 of the Clean Air Act did not confer jurisdiction on the district court to order the Administrator of the Environmental Protection Agency to revise federal standards for the presence in the ambient air of certain pollutants. We hold that the district court does have jurisdiction but believe subsequent actions of the Administrator have begun the required rulemaking.

Reversed and remanded. Judge Mahoney dissents in a separate opinion.

DAVID R. WOOLEY, Assistant Attorney General, State of New York (Robert Abrams, Attorney General of the State of New York, Peter R. Schiff, Assistant Attorney General of New York, of counsel),

JAMES T. B. TRIPP, Environmental Defense Fund, New York, New York (Robert E. Yuhnke, Environmental Defense Fund, Boulder, Colorado, of counsel),

David Hawkins, Natural Resources Defense Council, Washington, D.C.,

Howard Fox, Sierra Club Legal Defense Fund, Washington, D.C.

Hubert H. Humphrey III, Attorney General of the State of Minnesota (Ann Seha, Special Assistant Attorney General, State of Minnesota, of counsel),

Jeffrey L. Amestoy, Attorney General of the State of Vermont (J. Wallace Malley, Jr., Assistant Attorney General, State of Vermont, of counsel),

Joseph I. Lieberman, Attorney General of the State of Connecticut (Brian Comerford, Assistant Attorney General, State of Connecticut, of counsel),

Stephen Merrill, Attorney General of the State of New Hampshire, (George Dana Bisbee, Assistant Attorney General, State of New Hampshire, of counsel),

James M. Shannon, Attorney General of the Commonwealth of Massachusetts (Lee Breckenridge, Assistant Attorney General, Commonwealth of Massachusetts, of counsel), *for Plaintiffs-Appellants.*

JACQUES B. GELIN, Department of Justice, Washington, D.C. (Myles E. Flint, Deputy Assistant Attorney General, Michael A. McCord, Robert L. Klarquist, Department of Justice, Gerald K. Gleason, U.S. Environmental Protection Agency, Washington, D.C., of counsel), *for Defendants-Appellees.*

HENRY V. NICKEL, Washington, D.C. (Michael L. Teague, F. William Brownell, Norman W. Fichthorn, Hunton & Williams, Washington, D.C., Alfred V.J. Prather, Edwin H. Seeger, Kurt E. Blase, Prather, Seeger Doolittle & Farmer, Washington, D.C., Michael S. Devorkin, John Jacob Rieck, Jr., Doar Devorkin & Rieck, New York, New York, Vincent R. Fitzpatrick, Jr., Margaret Murphy, White & Case, New York, New York, Nancy C. Shea, James R. Bieke, Bruce C. Swartz, Shea & Gardner, Washington, D.C., of counsel), *for Intervenors-Appellees.*

WINTER, *Circuit Judge*:

This appeal involves the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (1982 and Supp. IV 1986) ("the Act"), and in particular its bifurcated jurisdictional scheme for judicial review of decisionmaking by the Environmental Protection Agency ("EPA"). The Act provides that suits to compel the Administrator to perform non-discretionary

duties may be brought only in district courts, while petitions seeking review of the Administrator's discretionary actions must be brought in the Court of Appeals for the District of Columbia. *See, e.g., Citizens for a Better Env't v. Costle*, 515 F. Supp. 264, 268 (N.D. Ill. 1981). Jurisdiction under the Act thus turns on the threshold question of whether the administrator's challenged action (or inaction) is discretionary or non-discretionary.

In the instant appeal, a number of environmentalist groups, along with six states, have challenged the Administrator's failure to revise the "National Ambient Air Quality Standards" ("NAAQS") for sulphur oxides ("SOx"). SOx are causative agents of both acid rain and dry acid deposition—phenomena we will refer to collectively as "acid deposition." Judge Edelstein held that the Administrator's authority to revise those NAAQS is discretionary and that the district court therefore did not have jurisdiction to entertain the suit. *Environmental Defense Fund v. Thomas*, 85 Civ. 9507 (S.D.N.Y. April 19, 1988). Although we agree that the Administrator has discretion to decide on the precise form and substance of the NAAQS at issue, we believe that under the circumstances the Administrator has a non-discretionary duty to make *some* formal decision whether to revise those NAAQS. Subsequent published actions by the Administrator have begun the process of decisionmaking, however, and we remand so the district court may enter an order that the rulemaking be continued to final decision.

BACKGROUND

The Clean Air Act was first passed in the 1960's and has since undergone two major legislative overhauls. The first of these overhauls, in 1970, established a multi-stage process for EPA evaluation of potential air pollutants. In the first stage, the EPA was, after scientific study, to publish "criteria" for the evaluation of any given potential pollutant. Section 108 of the Act, 42 U.S.C. § 7408

(1982). After the establishment of these "criteria," the EPA was to publish two types of initial NAAQS pursuant to Section 109 of the Act, 42 U.S.C. § 7409 (1982): (i) primary ambient air quality standards, designed to "protect the public health"; and (ii) secondary ambient air quality standards, designed to "protect the public welfare from any known or anticipated adverse effects associated with the presence of [a given] air pollutant in the ambient air." 42 U.S.C. § 7409(b).

The 1970 amendments distinguished between pollutants for which criteria had been announced before 1970 and pollutants for criteria were announced after 1970. In the case of pollutants for which criteria had been announced before 1970 (which included SOx), Sections 109(a)(1)(A) and (B) required the EPA to issue proposed initial primary and secondary NAAQS within 120 days of the passage of the 1970 amendments. In the case of pollutants for which criteria were announced after 1970, the amendments required the EPA to issue proposed initial primary and secondary NAAQS simultaneously with its publication of "criteria." The 1970 amendments added that both primary and secondary NAAQS "may be revised in the same manner as promulgated." 42 U.S.C. §§ 7409(b)(1) and (2).

The 1970 amendments also introduced into the statute a bifurcated jurisdictional scheme. In Section 307 of the Act, the 1970 amendments vested the Court of Appeals for the District of Columbia with exclusive jurisdiction to review a variety of rule promulgations and other "final actions" by the Administrator. 42 U.S.C. § 7607(b)(1982). In addition, Section 304 of the Act, the so-called "Citizen Suits" provision, permits any person to bring a civil action in a district court "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . . ." 42 U.S.C. § 7604(a)(2) (1982).

The second statutory overhaul occurred in 1977. These amendments added Section 109(d) concerning the "review and revision" of NAAQS, which provides that:

> [n]o later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under Section 108 . . . and promulgate such new standards as may be appropriate . . . . The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

42 U.S.C. § 7409(d) (1982). It is this section that plaintiffs seek to enforce by this action under Section 304.

The pollutants involved in this appeal, SOx, are causative or acid deposition and belong to the class of pollutants for which criteria had been issued before the 1970 amendments. In 1971, the Administrator promulgated primary and secondary NAAQS for SOx. 36 Fed. Reg. 8186. The secondary NAAQS were reviewed by the Court of Appeals for the District of Columbia and were thereafter remanded to the Administrator with instructions to elaborate on their justification. *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972). On that remand, the Administrator modified the secondary NAAQS. 38 Fed. Reg. 25679 (1973). The secondary NAAQS as modified were not designed to protect against the deleterious effects of SOx associated with acid rain and dry acid deposition—deleterious effects on water quality, wildlife, soils and forests, and corrosive effects of SOx on building materials, monuments and products. 38 Fed. Reg. 25680 (1973). Neither the primary SOx NAAQS as promulgated in 1971, nor the modified secondary SOx NAAQS of 1973, have been revised since.

In 1979, the Administrator undertook a review of the air quality criteria for SOx in response to the passage of Section 109(d)(1) in 1977. 44 Fed. Reg. 56731 col.

2 (1979). In 1982, that review resulted in the publication of new criteria both for SOx and for particulate matter, another pollutant, which includes forms of SOx, listed under Section 108. The new criteria described in some detail the ill effects associated with acid deposition. The Administrator did not, however, issue revised NAAQS for SOx. Indeed, the Administrator took no official public action, neither revising the existing standards nor formally declining to revise them. In 1984 and 1985, the EPA issued a three-volume "Critical Assessment" on the acid deposition effects of SOx. This did not constitute a formal revision of the SOx criteria, and the Administrator again took no action in conjunction with the issuance of this "Critical Assessment."

In 1985, appellants brought the instant case in the District Court for the Southern District of New York, pursuant to Section 304, the "Citizen Suits" provision of the Act, to compel the Administrator to promulgate revised NAAQS for SOx. Their complaint alleged that the revised criteria of 1982 and the "Critical Assessment" of 1984 and 1985 constituted a formal finding that SOx caused acid deposition threatening to the public health and welfare. Appellants claimed that those findings imposed on the Administrator a non-discretionary duty to revise the NAAQS for SOx, pursuant to Sections 109(b) and 109(d), in order to combat such health and welfare effects. Judge Edelstein disagreed. Looking to the language of Section 109(d), he concluded that the section created a mandatory duty only to revise pollutant criteria —an action the Administrator had taken in 1982. The Administrator, he held, had discretion not to revise the SOx NAAQS if he so chose. Because the duty to revise the NAAQS was discretionary, he concluded that the district court lacked jurisdiction over the dispute and dismissed the complaint.

One week after Judge Edelstein's decision, the EPA issued a "Proposed Decision Not To Revise the National

Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide)." 53 Fed. Reg. 14926 (April 26, 1988). In that "Proposed Decision," the Administrator announced that he was formally "propos[ing] not to revise [the primary and secondary] standards" for sulfur oxides, 53 Fed. Reg. at 14926 col. 1, and invited comments. However, the Administrator expressly excluded the problem of acid deposition from the list of welfare effects for which no revision of the secondary SOx NAAQS was necessary:

> 1. Based upon the current scientific understanding of the acid deposition problem, it would be premature and unwise to prescribe any regulatory control program at this time.
>
> 2. When the fundamental scientific uncertainties have been reduced through ongoing research efforts, EPA will craft and support an appropriate set of control measures.

Id. at 14936 col. 1. In light of this EPA action, appellants have narrowed their claim on appeal. Rather than challenging both the primary and secondary NAAQS, they abandoned the challenge to the primary NAAQS, which the Administrator has formally proposed not to revise in his "Proposed Decision," and limited their appeal to a challenge to the secondary NAAQS, the revision of which the Administrator has declared to be "premature and unwise."

DISCUSSION

Section 304 grants jurisdiction to district courts to compel the Administrator to perform non-discretionary statutory duties. *Cf. Council of Commuter Org. v. Metropolitan Transp. Auth.*, 685 F.2d 663, 665 (2d Cir. 1982). Section 307 grants exclusive jurisdiction to the Court of Appeals for the District of Columbia over "final" and other actions of the EPA. Because Section 307 embodies a grant of exclusive jurisdiction, it appears that if the

District of Columbia has jurisdiction over the present action, the district court does not. *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981). If the District of Columbia Circuit does not have jurisdiction, however, then either the district court has jurisdiction or appellants have no forum in which to assert their claims.

Appellants take the position that the district court has jurisdiction and must order the Administrator to revise the secondary NAAQS. Appellees argue that the Administrator may stand pat, deciding neither to revise the NAAQS nor to make a public decision that revision is unnecessary. In their view, such a non-decision is unreviewable by the Court of Appeals for the District of Columbia under Section 307 because it involves no decision or other agency "action" and is also invulnerable to challenge in district courts under Section 304 because it is discretionary. We disagree with both parties.

In view of the revised criteria and "Critical Assessment," we believe the Administrator must make *some* decision regarding the revision of the NAAQS that is thereafter reviewable under Section 307 in the Court of Appeals for the District of Columbia. Because the duty to make *some* decision is non-discretionary, it is enforceable Under Section 304 in the district courts. Appellants argue that in the present case a revision is mandatory and should be ordered by the district court. The substance of the Administrator's decision is beyond the power of the district court, however, its authority being limited to ordering the Administrator to make a formal decision. Were we to order a revision, we would have to set out criteria governing that revision, and the district court would potentially have to apply those criteria in an enforcement proceeding. An order to revise would thus plunge the district court into the merits, matters that are the exclusive province of the District of Columbia Circuit. We appreciate that this distinction is some-

what artificial but believe it is necessary to confine the district court's authority and to defer to the authority of the District of Columbia Circuit. The April 26, 1988 "Proposed Decision Not To Revise," however, has begun the formal process of decisionmaking, and we remand for entry of an order directing that process to continue.

Our analysis begins with an examination of the jurisdiction of the Court of Appeals for the District of Columbia. In *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), that court held that "a challenge to the Administrator's refusal to revise a standard of performance is in effect a challenge to the standard itself and so can be brought only in this court under Section 307(b)(1) of the Clean Air Act . . . ." *Id.* at 656. This language suggests that the District of Columbia Circuit has exclusive jurisdiction over the instant matter. The categorical language of *Oljato* is, however, misleading. *Oljato* involved Section 111 of the Act, which, at that time, included language permitting, but not requiring, the Administrator to revise the "standards of performance" for new statutory sources of air pollution. Because the statute included no stated deadlines for revision of the standards in question, the *Oljato* court could reasonably treat the decision to revise or not to revise as one wholly within the discretion of the Administrator. Since *Oljato*, however, the District of Columbia Court has distinguished between those revision provisions in the Act that include stated deadlines and those that do not, holding that revision provisions that do include stated deadlines should, as a rule, be construed as creating nondiscretionary duties. *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987). Section 109(d), the provision at issue here, includes a stated deadline of "[n]ot later than December 31, 1980, and at five-year intervals thereafter." *Oljato* thus does not apply.

The District of Columbia Circuit has also held that it may review agency inaction under the Administrative

Procedure Act where the agency has unreasonably delayed in performing a duty over which the District of Columbia Circuit would have jurisdiction after final action under the Act. *Sierra Club*, 828 F.2d at 795-96. Thus, the District of Columbia Circuit arguably has jurisdiction on the grounds that the EPA has unreasonably delayed its decision whether or not to revise the secondary NAAQS for SOx. The District of Columbia Circuit was careful in *Sierra Club*, however, to limit its exclusive jurisdiction to cases involving "a right the denial of which we would have jurisdiction to review upon final agency action but the integrity of which might be irreversibly compromised by the time such review would occur." *Id.* at 796. Appellants' claimed right in the instant case is not one whose integrity is likely to be "irreversibly compromised." We therefore conclude that the instant action does not raise a claim within the exclusive grant of jurisdiction to the District of Columbia Circuit under Section 307.[1]

---

[1] Our dissenting colleague argues that the District of Columbia Circuit has exclusive jurisdiction pursuant to the petitioning procedure outlined by way of dictum in *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 666 & 667 n.20 (D.C. Cir. 1975). We disagree. Because *Oljato* was decided before the enactment of Section 109(d), the *Oljato* court was interpreting a version of the Act that included no provision for the revision of NAAQS. The *Oljato* dictum was based on a Senate Report that, in proposing section 307, referred to "new information [which] will be developed and [which] may dictate a revision or modification of any promulgated standard or regulation established under the act." *Oljato* thus stated that suits involving such "new information . . . [which] may dictate a revision of modification" were subject to its exclusive jurisdiction. *Oljato*, 515 F.2d at 660-61 (quoting S. Rep. No. 91-1196, 91st Cong., 2d Sess. 41-42 (1970)). The *Oljato* court thus first determined that section 307 was the relevant jurisdictional provision, and then outlined a petitioning procedure for satisfying the requirements of that section. We, by contrast, have determined that section 304 is now the relevant statutory provision. The dictum in *Oljato* was made obsolete after the statutory overhaul that produced Section 109(d). Because the statute now expressly provides for the revision of standards, the problem of "new informa-

Having determined that the District of Columbia Circuit does not have exclusive jurisdiction, we now address what mandatory or, as the case may be, discretionary duties are created by the following language of Section 109(d) of the Act. To repeat, that section states in pertinent part:

> [n]ot later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 108 . . . and promulgate such new standards as may be appropriate . . . . The Administrator may review and revise criteria or promul-

---

tion . . . [which] may dictate a revision or modification" has now been addressed by Congress and the Act includes mandatory language that necessarily alters the jurisdictional scheme.

We also note here our disagreement with our colleague's reading of *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987). While it is true that *Sierra Club* states that "a duty of timeliness must 'categorically mandat[e]' that *all* specified action be taken by a date-certain deadline," *id.* at 791 (quoting *National Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1975)), that holding is not at odds with our ruling in this case. The statutory provision at issue here, Section 109(d), reads: "[n]ot later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria . . . and promulgate such new standards as may be appropriate . . . ." Our colleague argues that this provision does not require that *all* specified action be completed within the stated deadline—i.e., the Administrator is left to exercise his "appropriate" discretion as to whether or not to revise. This argument is, however, not inconsistent with our holding. We believe that the "specified action" under this section is the making of *some* decision within the stated deadlines, whether to revise new standards or not to revise. To the extent that the "specified action" is simply the making of *some* decision, *all* specified action *is* required to be completed within a stated deadline—and, indeed, a stated deadline very close in language and meaning to the stated deadline in the *Train* case, in which the D.C. Circuit first announced its rule. *See Train*, 510 F.2d at 697 (interpreting statutory language requiring promulgation of regulations and guidelines "within one year of enactment of this title . . . .").

> gate new standards earlier or more frequently than required under this paragraph.

Clearly this section includes both mandatory ("shall complete," "required") and non-mandatory language ("as may be appropriate"). Appellees rely on the phrase "as may be appropriate," arguing that Judge Edelstein was correct in holding that that language confers on the Administrator a wholly discretionary authority to revise the NAAQS, not to revise them, or simply not to address the issue with a formal public opinion. Appellants argue that, as a matter of statutory construction, Section 109 (d) must be interpreted in light of the mandatory language of Sections 109(a) and (b). Section 109(a), which requires the initial promulgation of NAAQS, contains clearly mandatory language directing the Administrator to issue NAAQS within 120 days for those pollutants for which criteria had been published before 1970 and to issue proposed NAAQS simultaneously with the publication of criteria for newly identified pollutants. Appellants argue that Section 109(d) should be read in light of this clearly mandatory language.

We find this argument unpersuasive. Section 109(d) contains no cross-reference to Section 109(a). Moreover, it is difficult to perceive why the standard for promulgation of initial NAAQS should be identical to that for revised NAAQS. Congress could have repeated the mandatory language of Section 109(a) in Section 109 (d), but did not do so. Appellants also argue that Section 109(d) should be read in light of Section 109(b)(2), which declares that secondary NAAQS "shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator . . . is requisite to protect the public welfare . . . ." Section 109(d) does include a cross-reference to Section 109(b). Because Section 109(b)(2) expressly entrusts the substance of secondary NAAQS to the "judgment of the Administrator," it is difficult to read it as imposing non-

discretionary duties. Furthermore, that section adds that secondary NAAQS "*may* be revised in the same manner as promulgated" (emphasis added). This permissive language suggests that, contrary to appellants' contention, the Administrator has discretion not to follow the procedures for issuing initial NAAQS when revising NAAQS. Harmonizing Section 109(d) with Section 109 (b) thus does nothing to further appellants' case.

Appellants also contend that language of Section 109 (d) itself, read in isolation, imposes a mandatory duty to revise the NAAQS. The phrase "as may be appropriate," they argue, is subject to the section's command that the Administrator "*shall* make . . . revisions." Under this view, the district court has jurisdiction to order the Administrator to make appropriate revisions in the NAAQS—power in short to issue orders affecting the substance of revised NAAQS. Again we disagree. The words "as may be appropriate" clearly suggest that the Administrator must exercise judgment and the presence of "shall" in the section implies only that the district court has jurisdiction to order the Administrator to make *some* formal decision whether to revise the NAAQS, the content of that decision being within the Administrator's discretion and reviewable only in the District of Columbia Circuit. *Cf. Natural Resources Defense Council v. New York State Dept. of Envtl. Conservation*, 87 Civ. 0505 (MEL) (S.D.N.Y. November 21, 1988).

Appellants advance a final argument, based on our caselaw. Conceding *arguendo* that the "as may be appropriate" language creates only discretionary authority, they contend that the district court has jurisdiction to compel the Administrator to revise its secondary NAAQS, the content of the revision being left to the Administrator. Under this view, the Administrator does not have power to decide not to revise. This argument is based on *Natural Resources Defense Council v. Train*, 545 F.2d 320 (2d Cir. 1976), which involved Section 108 of the Act. Section 108 requires the Administrator

to evaluate potential air pollutants and then to publish a list of those which "endanger public health or welfare," employing the following language:

> (a) (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—
>
> (A) emissions of which in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. . . .

In *Train*, the EPA had evaluated lead, and conceded that lead met its standard for pollutants that "endanger [the] public health or welfare." It refused, however, to include lead on its list of pollutants. The *Train* plaintiffs brought suit, under Section 304, the "Citizen Suits" provision, seeking to compel the EPA to include lead on its pollutant list. In agreeing with the plaintiffs, we reasoned that the EPA had a non-discretionary duty to list lead, noting that the language of Section 108 was clearly mandatory and that the EPA had concededly found lead to "endanger public health or welfare." Because the duty to list lead was not discretionary in light of the finding of harmfulness, we held that the district court had jurisdiction to hear the suit and ordered the Administrator to include lead on his list of pollutants.

Appellants contend that *Train* requires a similar result in the instant case. They observe that the EPA's revised criteria of 1982 and its "Critical Assessment" of 1984-1985 both acknowledge the adverse effects of SOx-caused acid deposition. The published acknowledgements of those adverse effects are, appellants argue, the equivalent of the EPA's explicit concession in *Train* concerning the adverse effects of lead. The 1982 criteria and the "Critical Assessment" constitute, in effect, a formal declara-

tion that revision of the SOx NAAQS is "appropriate" according to the terms of Section 109(d). In their view, the Administrator has thus already exercised his discretion, impliedly found revision to be "appropriate," and now has a non-discretionary duty, enforceable in the district court, to revise the NAAQS in line with his revised criteria.

This argument did not persuade Judge Edelstein, and it does not persuade us. Even if we were to treat the EPA's revised criteria of 1982 and its "Critical Assessment" of 1984-1985 as equivalent to the concession of the harmful effects of lead that underlay our holding in *Train*—and it is far from clear that we should do so, *cf. National Resources Defense Council, Inc. v. Thomas*, 689 F. Supp. 246, 254-56 (S.D.N.Y. 1988)—*Train* is still distinguishable from the present case. The duty at issue in *Train* was a thoroughly ministerial one. We did no more than affirm an order compelling the EPA to include "lead" on a list and to issue some NAAQS for lead. We did not, however, specify the content of those NAAQS. *Train*, 545 F.2d at 328. *Train* thus stands solely for the proposition that the district court has jurisdiction, under Section 304, to compel the Administrator to perform purely ministerial acts, not to order the Administrator to make particular judgmental decisions. An order in the instant case to the Administrator to revise the NAAQS for SOx would be essentially meaningless and unenforceable unless it also directed that he revise those NAAQS in a particular manner. Formulating the details of substantive NAAQS, however, clearly requires the sort of scientific judgment that is the "hallmark" of agency discretion, *Kennecott Copper Corp., Nevada Mines v. Costle*, 572 F.2d 1349, 1354 (9th Cir. 1978); *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1146 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980), and is exclusively within the jurisdiction of the District of Columbia Circuit.

However, if *Train* does not justify all of the relief that appellants seek, that is not to say that it does not justify any relief at all. Although the district court does not have jurisdiction to order the Administrator to make a particular revision, we cannot agree with appellees that the Administrator may simply make no formal decision to revise or not to revise, leaving the matter in a bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court. No discernible congressional purpose is served by creating such a bureaucratic twilight zone, in which many of the Act's purposes might become subject to evasion. The 1982 criteria and the 1984-1985 "Critical Assessment" triggered a duty on the part of EPA to address and decide whether and what kind of revision is necessary. The district court thus does have jurisdiction to compel the Administrator to make *some* formal decision as to whether or not to revise the secondary NAAQS. *Cf. Natural Resources Defense Council v. New York State Dep't of Envtl. Conservation, supra.*

This reading of *Train* comports with our reading of the presence of both "shall" and "may" in Section 109 (d). It also comports with the legislative history of Section 109(d). As the House Report stated,

> The Administrator is . . . *required* to promulgate new standards and revise existing standards as are appropriate under the terms of section 109(b) of the act.

H.R. No. 294, P.L. 95-95, 1977 U.S. Code Cong. & Admin. News 1261 (emphasis added). We recognize, of course, our obligation to defer to agency statutory construction where Congress's intent is not clear. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, *rehearing denied*, 468 U.S. 1227 (1984). Here, however, Congress's intent that the Administrator make *some* decision is clear.

Accordingly, we hold that, while the district court did not have jurisdiction to compel the Administrator to revise the NAAQS, it did have jurisdiction to compel the Administrator to take some formal action, employing rulemaking procedures, *see Thomas v. State of New York*, 802 F.2d 1443 (D.C. Cir. 1986), either revising the NAAQS or declining to revise them.

However, the Administrator's "Proposed Decision Not To Revise" of April 26, 1988, inviting comments on his determination that a decision as to the advisability of revising the secondary NAAQS for acid deposition "would be premature and unwise," is a required procedure in the course of reaching a formal decision. If this process continues, and a formal decision is rendered, appellants will have obtained all the relief to which they are entitled in a Section 304 action. Whether the decision when reached is wrong on the merits—even egregiously wrong —will be for the District of Columbia Circuit to resolve. We remand so the district court can enter an order directing the Administrator to continue the rulemaking to formal decision.

Reversed and remanded.

MAHONEY, Circuit Judge, dissenting:

I respectfully dissent, and would affirm the district court's determination that it lacked subject matter jurisdiction.

I do not agree with my colleagues that affirmance would leave a "bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court." Rather, I would think the procedure outlined in *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), was available to the plaintiffs here. Specifically:

> (1) The person seeking revision of a standard of performance, or any other standard reviewable under Section 307, should petition EPA to revise the standard in question. The petition should be submitted together with supporting materials, or references to supporting materials.
>
> (2) EPA should respond to the petition and, if it denies the petition, set forth its reasons.
>
> (3) If the petition is denied, the Petitioner may seek review of the denial in this court pursuant to Section 307.

Id. at 666.[1]

The quite limited role of a district court in the *Oljato* scheme is stated in the following terms:

> The Administrator's *failure to respond or inadequacy of response* may be appealable to the District Court

[1] Footnote 1 of the majority opinion states that the "statutory overhaul that produced section 109(d)" rendered the *Oljato* procedure "obsolete." I see no indication in the pertinent language or legislative history that any such result was intended, either with respect to section 109(d) or more generally. The District of Columbia Court of Appeals has consistently reiterated the continuing authority of *Oljato* subsequent to the 1977 legislative overhaul. *See, e.g., Envtl. Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 813 (D.C. Cir. 1983); *United States Brewers Ass'n, Inc. v. EPA*, 600 F.2d 974, 978-79 (D.C. Cir. 1979).

> under the APA even if the substance of the denial is not so appealable. In such a case, the District Court would have the power to demand that the Administrator issue a response, or a more complete response even if it would not have the power to invalidate the standard of performance or order a revision.

Id. at 667 n.20 (emphasis added). The limited role which *Oljato* footnote 20 allows to a district court is inapplicable here, however, since the *Oljato* procedure has not been invoked.

I do not view the provision of Section 109(d)(1) that the Administrator "shall" complete a thorough review of criteria at specified five-year intervals "and promulgate such new standards as may be appropriate" as providing a stated deadline, within the meaning of *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987), as to the promulgation of standards. *Sierra Club* states: "In order to impose a clear-cut nondiscretionary duty [enforceable under section 304], we believe that a duty of timeliness must 'categorically mandat[e]' that *all* specified action be taken by a date-certain deadline." *Id.* at 791 (quoting *National Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1975)). It doesn't seem to me that Section 109(d) meets this standard, since there is pretty clearly no requirement that standards be finally promulgated at the specified five-year intervals, or by any other date-certain deadline.[2]

---

[2] Footnote 1 of the majority opinion concludes that such a five-year deadline was imposed by section 109(d). The postulated deadline could be met, however, by a determination that no revision is appropriate at the time of the deadline, but a revision will be made if later developments warrant. This is essentially what the Administrator did here. In any event, this scenario points up the anomaly of forcing the Administrator's essentially discretionary section 109(d) determination to "promulgate such new standards as may be appropriate" into the straightjacket of section 304(a)(2) review of "any act or duty under this chapter which is not discretionary with the Administrator." In my view, the *Oljato* procedure

I would accordingly view this case as falling within the rule stated in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984): "we hold that where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Circuit Court of Appeals." A footnote, appended to the quoted statement, specified that this holding had "been considered separately and approved by the whole court, and thus constitutes the law of this circuit." *Id.* at 75 n.24.

I therefore respectfully dissent.

---

provides a preferable approach to Administrator inaction in areas committed to his discretion. I note in this regard the majority statement that a decision with respect to revision was required "[i]n view of the revised criteria and 'Critical Assessment,'" and the necessary implication that courts other than the District of Columbia Court of Appeals will review, to some undetermined extent, the substance of discretionary decisions by the Administrator.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

85 Civ. 9507 (DNE)

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NATIONAL PARKS AND CONSERVATION ASSOCIATION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW HAMPSHIRE, COMMONWEALTH OF MASSACHUSETTS, STATE OF VERMONT, STATE OF MINNESOTA, and STATE OF RHODE ISLAND,

Plaintiffs,

-against-

LEE M. THOMAS, Administrator of the United States Environmental Protection Agency and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants,

and

ALABAMA POWER COMPANY, PEABODY HOLDING COMPANY, INC., PEABODY COAL COMPANY, CONSOLIDATION COAL COMPANY, AMERICAN MINING CONGRESS, ASARCO, INCORPORATED, and MAGMA COPPER COMPANY,

Intervenors.

OPINION AND ORDER

[Filed April 19, 1988]

APPEARANCES:

ENVIRONMENTAL DEFENSE FUND, New York, New York, and Boulder Colorado, James T. B. Tripp, Michael E. Herz, and Robert E. Yuhnke, of counsel.

DONALD W. STEVER, JR., Pace University School of Law, White Plains, New York.

NATURAL RESOURCES DEFENSE COUNCIL, Washington, D.C., David Hawkins, of counsel.

SIERRA CLUB LEGAL DEFENSE FUND, Washington, D.C., Howard Fox, of counsel.

ROBERT ABRAMS, Attorney General of the State of New York, David R. Wooley, Assistant Attorney General, Michael Moore, Assistant Attorney General, of counsel.

JOSEPH I. LIEBERMAN, Attorney General of the State of Connecticut, Robert A. Whitehead, Assistant Attorney General, of counsel.

STEPHEN MERRILL, Attorney General of the State of New Hampshire, George Dana Bisbee, Assistant Attorney General, of counsel.

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts, Lee Breckenridge, Assistant Attorney General, Janet McCabe, of counsel.

JEFFREY L. AMESTOY, Attorney General of the State of Vermont, J. Wallace Malley, Jr., Assistant Attorney General, of counsel.

HUBERT H. HUMPHREY III, Attorney General of the State of Minnesota, Allan R. Mitchell, Special Assistant Attorney General, of counsel.

ARLENE VIOLET, Attorney General of the State of Rhode Island, Susan B. Squires, Special Assistant Attorney General, of counsel.

UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Michael A. McCord, Assistant Attorney General, of counsel.

RUDOLPH W. GIULIANI, United States Attorney for the Southern District of New York, Richard W. Mark, Assistant United States Attorney, of counsel.

ENVIRONMENTAL PROTECTION AGENCY, Washington, D.C., Earl Salo, Office of the General Counsel, of counsel.

HUNTON & WILLIAMS, New York, New York & Washington, D.C., David R. Marshall, Henry V. Nickel, Michael L. Teague, F. William Brownell, Lucinda E. Minton, for intervenors Alabama Power Company, et al.

JOHN DOAR LAW OFFICES, New York, New York, John Jacob Rieck, Jr., for intervenors Peabody Coal Company, Peabody Holding Company, Inc., and Consolidation Coal Company.

SHEA & GARDNER, Washington, D.C., James R. Bieke, Bruce C. Swartz, for intervenors Peabody Coal Company, Peabody Holding Company, Inc., and Consolidation Coal Company.

WHITE & CASE, New York, New York, Vincent R. Fitzpatrick, Jr., Margaret Murphy, for intervenors ASARCO Incorporated and Magma Copper Company.

SHEA & GARDNER, Nancy C. Shea, for intervenors ASARCO Incorporated and Magma Copper Company.

KOTITE, KAPLAN, BODIAN & EAMES, New York, New York, Robert I. Bodian, for intervenor The American Mining Congress.

PRATHER, SEEGER, DOOLITTLE & FARMER, Washington, D.C., Alfred V.J. Prather, Edwin H. Seeger, Kurt E. Blase, for intervenor The American Mining Congress.

AMERICAN MINING CONFERENCE, Washington, D.C., Edward M. Green, Douglas E. McAllister, Michael A. Poling, of counsel.

EDELSTEIN, District Judge:

Plaintiffs brought suit pursuant to 42 U.S.C. Section 7604 seeking to compel the Administrator of the Environmental Protection Agency ("EPA") to review and revise the existing air pollution standards for sulfur oxides. Plaintiffs subsequently moved for summary judgment. Defendants, in turn, moved for dismissal of the complaint or in the alternative, for an order granting summary

judgment. Finding that it lacks subject matter jurisdiction over the instant action, the court grants defendants' motion to dismiss.

BACKGROUND

Statutory Scheme

The Clean Air Act, 42 U.S.C. § 7401 et seq., establishes a system by which the federal government and the individual states cooperate in an effort to control air pollution. Central to this goal is 42 U.S.C. § 7408(a)(1)'s directive that the Administrator of the EPA ("Administrator") identify those pollutants "emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare [and] the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." *Id.*

Once a pollutant has been so identified, the Administrator is obliged to issue "air quality criteria" which describe the latest scientific knowledge relevant to the determination of the effects of the pollutant in the ambient air on the public health or welfare. 42 U.S.C. § 7408 (a)(2) Under the Clean Air Act, the term criteria is not used in its usual sense of constituting standards or guidelines. Rather, the criteria document produced pursuant to section 7408 (a)(2) supplies the scientific basis for the production of "national ambient air quality standards" setting limits on the permissible concentration of the relevant pollutants in the air. 42 U.S.C. § 7409(a). Under Section 7409 (b)(1) the Administrator must promulgate primary standards limiting pollutant concentrations to levels "which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1). The Administrator must also promulgate secondary standards specifying a "level of air quality the attainment and maintenance of

which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare." 42 U.S.C. § 7409(b)(2).

After the ambient standards are established, responsibility under the Clean Air Act shifts to the individual states. Each state must submit to the EPA a state implementation plan by which the standards might be realized. 42 U.S.C. §7410(a); *see also Lead Industries Association v. EPA*, 647 F.2d 1130, 1136-37 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980) (overview of promulgation process).

Standards, once established, are not immutable. Under Section 7408(c), the Administrator is under an obligation to "from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section." *Id.* Further, in 1977, Congress imposed time limits on the process of review and possible revision of standards by adding Section 7409(d)(1) to the Clean Air Act. Section 7409(d)(1) requires that by December 31, 1980, and every five years thereafter, the Administrator shall thoroughly review and, as appropriate, revise air quality criteria and standards.

Sulfur Oxides

In 1971, the Administrator promulgated primary and secondary pollutant standards for sulfur oxides. *See* 36 Fed. Reg. 8186 (1971). The secondary standards were subsequently directly challenged in the Circuit Court for the District of Columbia in 1972, and were remanded to the administrator for further explanation of their basis. *See Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972). As a result of reconsideration following remand, the secondary standards were modified in 1973. 38 Fed. Reg. 25678 (1973).

Although the primary standards have not been altered since 1971, and the secondary standards have not been

altered since 1973, review of the criteria and standards for sulfur oxide has occurred more recently. In 1984, the EPA issued a revised criteria document for sulfur oxides and completed a review of the sulfur oxide standards. That review did not result in any revision of the sulfur oxide standards. In 1986, the Administrator once again reconsidered the existing standards and opted against making any revisions at that time. *See* Plaintiff's Exhibit J at 11-12. Since that decision, the EPA has continued to accumulate data on sulfur oxide pollution.

Faced with the Administrator's decision not to revise the sulfur oxide standards, the Environmental Defense Fund, the Natural Resources Defense Council, the Sierra Club, and the National Parks and Conservation Association informed the EPA of their intention to bring suit if revisions did not issue. The Administrator did not revise the standards and the instant action was filed. Pursuant to Fed. R. Civ. P. 24(b)(2), the court permitted intervenors to join in the action. The plaintiffs subsequently moved for summary judgment. The defendants, in turn, moved to dismiss the complaint or, in the alternative, for an order granting summary judgment.

Jurisdiction

As a threshold inquiry, this court must determine whether it has jurisdiction over the instant action. This case is a citizen suit filed pursuant to 42 U.S.C. § 7604[1] (Section 304 of the Clean Air Act). Section 7604 provides that any person may commence a civil action in his own behalf to compel the Administrator of the EPA to

[1] 42 U.S.C. Section 7604 provides in part "any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator." *Id.*

For a discussion of the alternative bases for jurisdiction propounded by the plaintiff, see *infra*, pages 26-28.

perform non-discretionary duties. *Id.* at (a)(2). Such civil actions are appropriately brought in the federal district courts. Challenges to the discretionary acts of the Administrator, on the other hand, are beyond the scope of Section 7604 and must be brought pursuant to 42 U.S.C. § 7607 (Section 307 of the Clean Air Act).[2] Juris-

---

[2] Section 7607(b) of Title 42 provides:

Judicial Review. (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112 [42 U.S.C. § 7412], any standard of performance or requirement under section 111 [42 U.S.C. § 7411], any standard under section 202 [42 U.S.C. § 7521] (other than a standard required to be prescribed under section 202(b)(1) [42 U.S.C. § 7521(b)(1)]), any determination under section 202(b)(5) [42 U.S.C. § 7545], any standard under section 231 [42 U.S.C. § 7571] any rule issued under section 113, 119, or under section 120 [42 U.S.C. §§ 7413, 7419, or 7420], or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) [42 U.S.C. § 7410 or 7411(d)], any order under section 111(j), [42 U.S.C. § 7411(j)], under section 112(c) (42 U.S.C. § 7412(c)], under section 113(d) [42 U.S.C. § 7413(d)], under section 119 [42 U.S.C. § 7419], or under section 120 [42 U.S.C. § 7420], or his action under section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or any final action of the Administrator under title I [42 U.S.C. §§ 7401 et seq.]) which is locally or regionally applicable may be filed only in the United States Courts of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days

diction over suits brought pursuant to Section 7607 is expressly limited to the United States Circuit Court for the District of Columbia. Thus, in determining whether this court has jurisdiction to hear this dispute, it is necessary to examine the nature of the Administrator's duties.

Plaintiffs argue that the Administrator has failed to perform certain nondiscretionary duties imposed upon by by 42 U.S.C. § 7409(d) (Section 109(d) of the Clean Air Act). Section 7409(d) provides that:

> [n]ot later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 108 [42 U.S.C. § 7408] and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 108 [42 U.S.C. § 7408] and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

Plaintiffs in their motion for summary judgment, contend that the Administrator failed to perform 1) the nondiscretionary duty to revise the primary standards for sulfur oxides prior to December 31, 1985; 2) the nondiscretionary duty to revise the secondary standards for sulfur oxides prior to December 31, 1985; and 3) the nondiscretionary duty to revise the ambient standards for sulfur oxides simultaneously with the issuance of air quality

---

from the date of notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

criteria.[3] Accordingly, plaintiffs request that the Administrator be ordered to propose revisions to the standards within thirty days and promulgate a final rule ninety days thereafter. Defendants, in response, claim that the duties described by the plaintiffs are in fact discretionary and thus beyond the scope of a section 7604 citizen suit. Accordingly, defendants move to dismiss the complaint for lack of subject matter jurisdiction or, in the alternative, move for an order granting summary judgment.

---

[3] The complaint filed in the instant case also charges that the EPA failed to perform its non-discretionary duty to review the sulfur oxide standards and accordingly requests that such a review be ordered. This claim was not pressed in the motion for summary judgment and plaintiffs now concede that a review did in fact occur. *See* Plaintiffs' Memorandum in Support of Motion for Summary Judgment, at 50. If there had been any failure to make timely reviews of the standards prior to the most recent review, such an omission does not constitute a live controversy and is not justiciable. *See Jackson v. Village of Ossining*, No. 82-2012, slip op. (S.D.N.Y. March 30, 1983) (action to compel Secretary of Housing and Urban Development to take mandatory action rendered moot by compliance with duty after case was filed).

The plaintiffs also claim that the Administrator failed in his mandatory duty to publish a formal notice of the completion of his review of the sulfur oxides standards and a formal determination as to the adequacy of the current standards to protect public health and welfare. If the Administrator determines that revision is appropriate, he must then publish proposed revisions to the standards. 42 U.S.C. §§ 7607(d)(a)(A), (d)(3). The Clean Air Act however, makes no provision for the publication of the Administrator's decision that revision of the standards is not called for. Absent clear instruction from Congress, courts should be reluctant to deem duties mandatory, and thus reviewable under 42 U.S.C. § 7401. *See Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1353 (9th Cir. 1978). Here, not only is there no indication in the statute that the duty is mandatory, there is no indication that any such duty exists. As the Administrator has no mandatory duty to publish his decision to not alter pollutant standards, there can be no review pursuant to 42 U.S.C. § 7401 of the failure to publish. Thus, this court lacks subject matter jurisdiction over this claim.

Discretionary Duty

In establishing the citizen suit provision of the Clean Air Act, Congress was clearly concerned with the possibility that abuse of that provision could lead to disruption of the administrative process. Accordingly, Congress limited section 7604's applicability to actions compelling the Administrator to perform "specific non-discretionary clear-cut requirements." *Mountain States Legal Foundation v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980), *cert. denied*, 450 U.S. 1050 (1981). Thus, in accordance with Congress' intent to limit disruption of the Administrative process, this court begins its analysis with the proposition that a court, absent clear statutory language to the contrary, should be reluctant to deem duties non-discretionary. *See Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1353 (9th Cir. 1978).

Plaintiffs contend that the duties in question are clearly of a nondiscretionary nature. In support of their position, plaintiffs argue that the text of Section 7409(d) when read in conjunction with certain factual findings made by the EPA demonstrates that the duties are mandatory. Further, plaintiffs contend that 42 U.S.C. § 7409 (a)(2), when read in conjunction with Section 7409(d), required the Administrator to issue revised standards for sulfur oxides when he issued revised sulfur oxide criteria. The defendants, in turn, contend that the statutes in question impose only the requirement that the Administrator exercise his discretion. Each of these areas of contention shall be addressed in turn.

1. Section 7409(d)

Plaintiffs note that section 7409(d) states that the Administrator "shall" complete a review of air quality standards not later than December 31, 1980, and at five year intervals thereafter and "shall" make such revisions as may be appropriate. 42 U.S.C. § 7409(d). Plaintiffs also note that Section 7409(d) provides that the "Ad-

ministrator may review and revise criteria or promulgate new standards earlier or more frequently than *required* under this paragraph." *Id.* (emphasis added).

The term "required" demonstrates that the section 7409(d) does impose some mandatory duty on the Administrator. Specifically, the term "shall" clearly imposes a duty on the Administrator to periodically review air quality standards. Plaintiffs, however, do not contend that the Administrator has failed to perform his obligation to review the air quality standards relevant to sulfur oxides. *See supra* note 3. Rather, plaintiffs contend that the Administrator's review demonstrates that the existing standards are inadequate and accordingly those standards must be revised.

The text of Section 7409(d), per se, cannot be read to supply the basis for an order requiring the Administrator to now revise the standards for sulfur oxides. Although section 7409(d) does mandate the review of the relevant standards, revision of those standards is apparently left to the discretion of the Administrator. The language of the statute provides that the Administrator shall make such revisions "as may be appropriate." The term "may" is properly understood to be permissive. *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). The determination of what is "appropriate" clearly calls for the exercise of discretion and expert judgment. *Cf. American Iron & Steel Institute v. Costle*, 12 Env't Rep. Cases 1008, 1009 (W.D. Pa. 1978) (interpreting term "as appropriate" appearing in 42 U.S.C. § 7408(c), Section 108 (c) of the Clean Air Act). Such a decision "requires the fusion of technical knowledge and skills which is the hallmark of duties which are discretionary." *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1354 (9th Cir. 1978); *see also Connecticut Fund for the Environment, Inc. v. EPA*, 696 F.2d 169, 177 (2d Cir. 1982) (court deferring to Agency's expertise on technical issue).

Under the terms of the statute, it is possible that the Administrator could find, following his review of the criteria, that revision is not called for. *See City of Spokane v. Thomas*, No. C-85-095, slip op. (E.D. Wash. June 10, 1985) (Plaintiffs' Exhibit R). In the Administrator's view, this is precisely the scenario presented by the instant case. Thus, if the court was to accept the Administrator's representation that he decided that revisions are not now called for, it would appear that the Administrator has satisfied those mandatory duties which exist under Section 7904(d).[4] Specifically, the Administrator has completed his review of the sulfur oxide criteria and

---

[4] In support of their position, defendants cite to the case of *Oljato of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975). In *Oljato*, the petitioners challenged the EPA's refusal to revise previously promulgated standards for emissions of sulfur oxides from newly constructed coal fueled electricity generation stations. In that case, rejecting a claim that failure to revise constituted a violation of a nondiscretionary duty, the Circuit Court ruled that the action to compel revision of standards was beyond the jurisdiction of the district court.

In *Oljato*, the standards in question were promulgated pursuant to 42 U.S.C. § 1857 c-6 (1970), (Section 111 of the Clean Air Act). That section provided that "[t]he Administrator may, from time to time, revise such standards." This language, although not identical, is similar to Section 7409(d)'s instruction that "[t]he Administrator shall make revisions . . . as may be appropriate." This similarity supports defendants' claims that Section 7409(d), like Section 111 of the Clean Air Act as it was interpreted in *Oljato*, creates merely a discretionary obligation on the part of the Administrator.

Oljato is also significant in that it demonstrates that by adopting the EPA's interpretation of Section 7409(d), this court does not insulate the Administrator's acts from judicial review. *Oljato* establishes a procedure by which plaintiffs could petition the EPA to revise the relevant standard. If that petition were to be denied, plaintiffs could then seek judicial relief in the Circuit Court for the District of Columbia pursuant to 42 U.S.C. § 7607. *See Oljato* at 666.

standards.[5] Although rejected by this court, the proposition that review and revision of pollutant standards are inevitably linked is not totally without basis.[6] On the other hand, an Administrative Agency's construction of a statutory scheme it was entrusted to enforce is to be given deference absent clear contrary congressional intent. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (interpreting Clean Air Act). In the instant case, the Administrator's reading of the statute follows from the section's language and is consonant with the legislative intent embodied in section 7409.[7] Thus, this court rejects the proposition that under the terms of Section 7409(d), the Administrator is now under a nondiscretionary duty to revise the standards for sulfur oxides.

---

[5] Section 7409(d) includes both the words "shall" and "may" in a single sentence. When such words are used in such close proximity, there is fair inference that Congress realized the differences in meaning and intended different treatment for the predicates following those terms. 2A N. Singer, Sutherland Statutes and Statutory Construction § 57.11 (4th ed. 1984). Thus, it appears that the process of review, which "shall" take place, is mandatory. On the other hand, the process of revision, which is to take place "as may be appropriate," is discretionary. 42 U.S.C. § 7409(d).

[6] For example, in the case of *City of Spokane v. Thomas*, No. C-85-095, slip op. (E.D. Wash. June 10, 1985), the Court speaks of a duty to "review *and* revise" imposed by section 7409(d). *Id.* at 1 (emphasis added). In *Thomas*, however, the court at no time stated that a review must result in a revision of the relevant standard. Indeed, the *Thomas* Court expressly recognized that the mandatory review might appropriately lead the Administrator to decide not to alter the existing standard. *Id.* at 10. Thus, for this reason, and for the reasons stated above, this court rejects the proposition that the Administrator was under a nondiscretionary duty to revise the standards for sulfur oxides.

[7] Section 7409(d)'s legislative history supports defendants' claims of broad discretion in determining when and how to revise pollutant standards. *See* H.R. Rep. No. 294, 95th Cong., 1st Sess. 182-83 (1977).

Plaintiffs, nevertheless, assert that in light of certain factual findings allegedly made by the Administrator, Section 7409(d) now compels the Administrator to revise the sulfur oxide standards. Specifically, plaintiffs assert that following the Administrator's review of the sulfur oxide standards, the Administrator, despite his current protests to the contrary, determined that the existing standards are inadequate. Therefore, it is contended, the Administrator is now under a mandatory duty to revise the standards. In support of this proposition, plaintiffs argue that the instant case is analogous to the case of *Natural Resources Defense Council v. Train*, 545 F.2d 320 (2d Cir. 1976).

In that case, the Second Circuit ruled that upon determining that a given pollutant satisfies the requisites of 42 U.S.C. § 7408, the Administrator had a nondiscretionary duty to list that pollutant.[8] Section 7408 pro-

---

[8] Section 7408(a) provides:

(1) For the purpose of establishing national primary and secondary ambient quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient

vides that a pollutant must be added to the official list of air pollutants when the Administrator determines that the pollutant has an adverse effect on public health or welfare, *see* 42 U.S.C. § 7408(a)(1)(A), and is introduced into the ambient air from numerous or diverse mobile or stationary sources. *See* 42 U.S.C. § 7408(a)(1)(A). After including a pollutant on the list, the Administrator must issue air quality criteria for that pollutant within twelve months.

In *Train*, the EPA acknowledged that these criteria had been satisfied. Nevertheless, the Administrator declined to list lead as a pollutant. In doing so, the Administrator argued that there was a third criterion yet to be satisfied. Specifically, the Administrator relied on Section 7408(a)(1)(C). That subsection provides that a pollutant shall be listed if air quality criteria had not been issued for that pollutant before December 31, 1970 but the Administrator does plan to issue air criteria pursuant to Section 7408. Thus, the Administrator claimed that even when the criteria set forth in Section 7408(a)(1)(A) and (B) were met, he would be free, if he so chose, to decline to list the pollutant.[9]

Examining the section's legislative history, the Second Circuit rejected the proposition that Section 7408(a)(1)

---

air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

[9] Despite the position taken by the Administrator in *Train*, the Administrator had previously operated on the policy that upon satisfying Section 7408(a)(1)(A) and (b)(1)(B), a pollutant must be listed. *Train*, 545 F.2d at 325.

(C) adds a third condition to the list of a pollutant. Thus, as the EPA conceded that the pollutant satisfied the requirements of the first and second criteria, the Administrator was ordered to list the pollutant.

In the instant case, a quite different section of the Clean Air Act is being subjected to the judicial scrutiny. The legislative history for Section 7408 clearly contradicted the Administrator's interpretation of that section. In the instant case, the Administrator's understanding of Section 7409 follows from the language of that section. Further, the legislative history supports the Administrator's interpretation of Section 7409. *See supra* note 7. In *Train*, the Administrator declined to perform a clear mandatory duty imposed by Congress. In the instant case, the text and intent of the relevant statute calls for the exercise of discretion on the part of the Administrator. Thus, the interpretation of Section 7408 found in *Train* is not applicable to Section 7409.

The Second Circuit's decision in *Train* merely required that lead be included in the list of pollutants compiled under Section 7408. Section 7408, which calls for the listing of a pollutant upon the satisfaction of two specific criteria is quite different than a revision of pollutant standards pursuant to Section 7409. The establishment and revision of standards requires the marshalling of extensive scientific data, the weighing of conflicting reports, and an ultimate exercise of judgment and discretion. Another significant difference between *Train* and the instant case is that in *Train*, the EPA conceded that all valid statutory prerequisites to listing a pollutant had been met. In the instant case, although plaintiffs assert that the Administrator has found that the sulfur oxide concentrations allowed under the existing standards cause adverse effects on public health or welfare, the Administrator contests that any such finding was made. In support of their contention, plaintiffs cite a number of EPA studies and documents. The plaintiffs, however, are

not able to cite to any express finding by the Administrator that the existing standards are inadequate to protect the public health or welfare. Rather, it is contended that in the aggregate, the studies and documents cited constitute such a finding.

The documents cited cannot fairly be read to be a finding by the Administrator that revision of standards is now appropriate. The plaintiffs, in effect, are selectively reviewing the technical data presented to the Administrator, and seek to replace his judgment with their own or with the judgment of this court. Further, even if the EPA had found the existing standards inadequate, in order to issue revised standards, the Administrator must be able specify a standard which would be "requisite to protect" the public health or welfare from the adverse effects of the relevant pollutant. 42 U.S.C. § 7409 (b). There exists considerable scientific debate regarding the causes and specific nature of sulfur oxide pollution. It is clear that scientific uncertainty is not a bar to agency action. *See Lead Industries Association v. EPA*, 647 F.2d 1130, 1154-55 & n.50 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980). Nevertheless, scientific uncertainty is clearly relevant to the question of whether the Administrator, in his discretion, can establish a new standard requisite to protect the public health or welfare.

The plaintiffs are no doubt sincere in contesting the adequacy of the existing sulfur oxide standards. However, as the setting of those standards falls within the discretion of the Administrator, any challenge must be made in the Circuit Court for the District of Columbia. *See* 42 U.S.C. § 7607. A Section 4604 citizen suit may not be used to substitute the Administrator's judgment with that of a plaintiff. The process by which the Administrator must decide whether or how to revise the standards is complex. Under 4709(b), the Administrator must make a two-fold determination. First, the Administrator must determine whether ambient concentrations

of the pollutant are adversely affecting the public health or welfare. Second, the Administrator must be able to specify a new or revised standard level that is "requisite to protect" the public health or welfare from such adverse effects. Such determinations clearly require marshalling of scientific data and the exercise of expert judgment. These are tasks appropriately left to an administrative agency.[10]

2. Section 7409(a)(2)

In further support of the proposition that the Administrator is now obliged to revise the sulfur oxide standards, plaintiffs cite 42 U.S.C. § 7409(a)(2).[11] That sub-

---

[10] The text of 42 U.S.C. § 7409(b), the section prescribing the goals for pollutant standards, underscores the discretion afforded the Administrator in setting and revising pollutant standards. That section provides:

> National primary ambient air quality standards, prescribed, under subsection (a) shall be ambient air quality standards the attainment and maintenance of which *in the judgment of the Administrator*, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.
>
> (2) Any national secondary ambient air quality standard prescribed, under subsection (a) shall specify a level of air quality the attainment and maintenance of which *in the judgment of the Administrator* based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

Id. (emphasis added).

[11] Intervenors argue that this court should not now consider plaintiffs' claim that the Administrator failed to perform his duties under 42 U.S.C. § 7409(a)(2). Intervenors' claim of preclusion is based on plaintiffs' failure to seek relief pursuant to 42 U.S.C. § 7607(b)(1) within sixty days of the March 1984 Federal Register announcement of the publication of the revised criteria document. As plaintiffs have asserted that the Administrator

section, which was added to the Clean Air Act as part of the 1970 amendments to that statute, provides in pertinent part:

> With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970], the Administrator *shall publish, simultaneously* with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant.

Id. (emphasis added).

Plaintiffs argue that under Section 7409(a), the EPA was obliged to simultaneously issue new sulfur oxide standards when it issued revised sulfur oxide criteria. It is not contested that revised sulfur oxide criteria were issued. Nevertheless, the Administrator argues that he was not obligated to simultaneously publish proposed air quality standards for those pollutants. In support of this position, the Adminstrator argues that the simultaneous publication requirement is limited to the initial issuance of criteria for pollutants and is not applicable to subsequent revisions of such criteria. Further, the Administrator contends that the simultaneous publication requirement applies only to pollutants for which criteria were first issued after the 1970 enactment date of Section 7409 (a)(2).

To best understand the scope of Section 7409(a)(2)'s simultaneous publication requirement, it is helpful to examine that section in context with 42 U.S.C. §§ 7409(a)(1)(A) and (B). Those sections provide:

---

failed to perform a nondiscretionary duty, absent further inquiry, it would be unclear whether their claim could be heard pursuant to 42 U.S.C. § 7604. Accordingly, inquiry as to the merits of plaintiffs' claim is appropriate. As this court concludes that the Administrator was not under any obligation to publish standards simultaneously with the publication of the criteria document, intervenors' procedural objection is ultimately of no moment.

> (1) (A) [The Administrator] within 30 days after the date of enactment of the Clean Air Act Amendments of 1970 [enacted Dec. 31, 1970], shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and
>
> (B) after a reasonable time for interested persons to submit written comment thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

Id.

Sections 7409(a)(1)(A) and (B) set forth the procedure by which standards would be established for pollutants for which air quality criteria had been established prior to the enactment of the 1970 amendments to the Clean Air Act.[12] Those pollutants include sulfur oxides, the subject of the instant litigation. Section 7409(a)(2), and its simultaneous publication requirement, on the other hand, relates by its terms to those pollutants for which criteria were issued after the date of the enactment of Section 7409(a). Thus, at least prior to the issuance of revised sulfur oxide criteria, Section 7409(a)(2) had no application to the control of sulfur oxide pollution. *See* S. Rep. 1196, 91st Cong. 2d Sess. 10-11 (1970) (indicating Section 7409(a)(2) is inapplicable to sulfur oxides).

---

[12] Prior to the passage of the 1970 Amendments to the Clean Air Act, including the addition of Section 7409, air quality criteria had already been established for a number of pollutants. Sulfur oxides were among those pollutants.

It is less certain, however, whether any subsequent revision of sulfur oxide criteria would implicate Section 7409(a)(2). That section does not expressly provide that its scope is limited to the initial issuance of criteria. Similarly, it is not explicitly stated that Section 7409(a)(2)'s purview does not include subsequent revisions of standards issued pursuant to Sections 7409(a)(A) and (B). Nevertheless, the organization and history of Section 7409 indicate this is in fact the case.

In 1977, Section 7409(d) was added to the Clean Air Act. While the text of Section 7409(a) has as its heading "[p]romulgation" of national primary and secondary ambient air quality standards, the heading of Section 7409(d) reads "[r]eview and revision of criteria and standards . . . ." Although statutory headings are not properly used to refute the plain meaning of a statute, they do supply guidance in interpreting ambiguities in that statute. *See Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29 (1947). The plain language of Section 7409 does not unequivocally support either plaintiffs' or defendants' reading of the simultaneous publication requirement. The relevant headings, however, do support the defendants' contention that there is a bifurcation of the processes of promulgating and revising standards. Further, such bifurcation supports defendants' argument that the simultaneous publication requirement applies only to the initial promulgation of criteria and standards.

Section 7409(d) clearly governs the procedure by which criteria and standards are to be revised. Significantly, Section 7409(d) does not contain any provision calling for simultaneous publication nor does it cross-reference to Section 7409(a)(2). Further, by providing that the "Administrator may review and revise criteria *or* promulgate new standards" more frequently than required under the statute, Section 7409(d) does not inexorably link the revision of criteria and the issuance of standards.

Id. (emphasis added). Under 7409(d), the Administrator is granted broad discretion to make "appropriate" revisions in both pollutant criteria and standards. It would appear that the Administrator's decision to revise the sulfur oxide criteria without also issuing new standards is included within such discretion.

The Administrator's reading of Sections 7409(a) and (d) follows from both the language and organization of those sections. An administrative agency's construction of a statutory scheme it was entrusted to enforce is to be given deference absent clear contrary congressional intent. *Chevron U.S.A. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 844 (1984) (interpreting Clean Air Act). There has been no showing that Congress' intent differs from the Administrator's interpretations of his obligations under Section 7409. Accordingly, this court rejects plaintiffs' assertion that under Section 7409(a)(2), the Administrator was obliged to simultaneously publish revised standards upon issuing revised criteria. Thus, it is apparent that the revision and publication of sulfur oxide pollutant standards falls within the discretion of the Administrator. As plaintiff's complaint addresses non-mandatory duties, the complaint's invocation of jurisdiction pursuant to 42 U.S.C. § 7604 is unavailing.

Alternative Bases for Subject Matter Jurisdiction

In addition to invoking federal jurisdiction pursuant to the citizen suit provisions of the Clean Air Act, the plaintiff relies on federal question jurisdiction, 28 U.S.C. § 1331, the Mandamus Act, 28 U.S.C. § 1361, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, as additional bases for subject matter jurisdiction in the instant case. Appeal to these statutes is unavailing.

Federal question jurisdiction is not appropriately invoked when the federal statute in question establishes the

means by which it is to be enforced. *See Telcommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984). The Clean Air Act provides that a private citizen may bring suit in the federal district courts to compel the Administrator to perform nondiscretionary duties. *See* 42 U.S.C. § 7604(a)(2). Discretionary duties, such as those addressed in plaintiffs' complaint and motion for summary judgment, by the terms of 42 U.S.C. § 7607(b), may only be reviewed in the Circuit Court for the District of Columbia. When a statute vests jurisdiction in one particular court, all other courts lose jurisdiction over cases brought pursuant to that statute. *See Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984).[13] The acts and omissions which are the subject of this action fall within the scope of the discretion of the Administrator. Thus, jurisdiction could only exist in the Circuit Court for the District of Columbia and plaintiff's appeal to federal question jurisdiction in this court must fail. *See Dow Chemical Co. v. Costle*, 480 F. Supp. 315, 320 (E. D. Mich. 1978), *aff'd* 659 F.2d 724 (6th Cir. 1981).

Both the Mandamus Act and the Declaratory Judgment Act are remedial in nature and do not supply any independent basis for jurisdiction. *See St. Vincent's Hospital v. Division of Human Rights*, 553 F. Supp. 375, 377 (S.D.N.Y. 1982) (Declaratory Judgment Act); *Smith v. Lehman*, 533 F. Supp. 1015, 1018 (E.D.N.Y.), *aff'd*, 689 F.2d 342 (2d Cir. 1982), *cert. denied*, 459 U.S. 1173 (1983) (Mandamus Act). Further, the Mandamus Act is unavailable absent a plainly defined and mandatory duty. *See Heckler v. Ringer*, 466 U.S. 602, 616-17 (1984). As indicated above, the Administrator has ig-

---

[13] The text of 42 U.S.C. § 7607(e) further supports the conclusion that federal question jurisdiction is unavailable in the instant case. That section provides "[n]othing in this Act shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section." *Id.*

nored no such duty. Thus, the alternative bases for jurisdiction propounded by plaintiffs are unavailing. As this court lacks subject matter jurisdiction over the instant action, this court does not rule on the motions for summary judgment but rather dismisses the complaint.

CONCLUSION

The defendants' motion to dismiss the complaint for lack of subject matter jurisdiction is hereby granted.

SO ORDERED

Dated: New York, New York
April 19, 1988

/s/ David N. Edelstein
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

85 CIVIL 9507 DNE

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Plaintiffs

-against-

LEE M. THOMAS, ADMINISTRATOR OF THE
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et ano*

-and-

ALABAMA POWER COMPANY, *et al.*,
Intervenors

JUDGMENT

Plaintiffs having moved for summary judgment and the defendants having moved for dismissal of the complaint or in the alternative for summary judgment and the said motions having come before the Honorable David N. Edelstein, U.S.D.J., and the Court thereafter on April 19, 1988, having handed down its opinion and order (#62411), granting defendants' motion to dismiss the complaint for lack of subject matter jurisdiction, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed for lack of subject matter jurisdiction.

DATED: NEW YORK, N.Y.
April 21, 1988

/s/ Elaine B. Goldsmith
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of March one thousand nine hundred and eighty-nine.

Present:

HON. ELLSWORTH A. VANGRAAFEILAND

HON RALPH K. WINTER

HON. J. DANIEL MAHONEY

Circuit Judges,

88-6142

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NATIONAL PARKS AND CONSERVATION ASSOCIATION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW HAMPSHIRE, COMMONWEALTH OF MASSACHUSETTS, STATE OF VERMONT, STATE OF MINNESOTA, and STATE OF RHODE ISLAND,

Plaintiffs,

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NATIONAL PARKS AND CONSERVATION ASSOCIATION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW HAMPSHIRE,

COMMONWEALTH OF MASSACHUSETTS, STATE OF VERMONT, STATE OF MINNESOTA,

Plaintiffs-Appellants,

-v.-

LEE M. THOMAS, Administrator of the U.S. Environmental Protection Agency, and the U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellees,

ALABAMA POWER COMPANY, et al., PEABODY HOLDING COMPANY, INC., PEABODY COAL COMPANY, CONSOLIDATION COAL COMPANY, AMERICAN MINING CONGRESS, ASARCO INCORPORATED, MAGMA COPPER COMPANY,

Intervenors-Appellees.

Appeal from the United States District Court
for the Southern District of New York

MANDATE
[Filed March 22, 1989]

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of the said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH
Clerk

/s/ Edward J. Guardaro
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eighth day of June, one thousand nine hundred and eighty-nine.

Docket Number 88-6142

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NATIONAL PARKS AND CONSERVATION ASSOCIATION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW HAMPSHIRE, COMMONWEALTH OF MASSACHUSETTS, STATE OF VERMONT, STATE OF MINNESOTA, and STATE OF RHODE ISLAND, *Plaintiffs*,

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NATIONAL PARKS AND CONSERVATION ASSOCIATION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW HAMPSHIRE, COMMONWEALTH OF MASSACHUSETTS, STATE OF VERMONT, STATE OF MINNESOTA,
Plaintiffs-Appellants,

-v.-

LEE M. THOMAS, Administrator of the U.S. Environmental Protection Agency, and the U.S. ENVIRONMENTAL PROTECTION AGENCY,
Defendants-Appellees,

ALABAMA POWER COMPANY, et al., PEABODY HOLDING COMPANY, INC., PEABODY COAL COMPANY, CONSOLIDATION COAL COMPANY, AMERICAN MINING CONGRESS, ASARCO INCORPORATED, MAGMA COPPER COMPANY,
Intervenors-Appellees.

[Filed June 8, 1989]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellees ALABAMA POWER CO. ET AL., PEABODY HOLDING CO. INC., PEABODY COAL COMPANY, ASARCO INCORPORATED, MAGMA COPPER CO.

UPON CONSIDERATION by the panel that heard the appeal, it is –

Ordered that said petition for rehearing is DENIED, Judge Mahoney dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

STATUTORY PROVISIONS

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate

in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later

than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1) (B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) National primary ambient air quality standards for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period

of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required

to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

§ 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an order, or to order the Administrator to perform such act or duty, as the case may be.

§ 7607. Administrative proceedings and judicial review

* * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable

may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

* * * *

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

* * * *

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). When-

ever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rule-

making. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B) (i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary informa-

tion; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completition of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6) (A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7) (A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4) (B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule

and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capracious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of para-

graph (7) (B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

85 Civ. 9507 (DNE)

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Plaintiffs,

v.

LEE M. THOMAS, *et al.*,
Defendants,

and

ALABAMA POWER COMPANY, *et al.*,
Intervenor-Defendants.

DEFENDANTS' ANSWERS TO FIRST SET OF INTERROGATORIES

Pursuant to the Federal Rules of Civil Procedure, the defendants, Lee M. Thomas and the United States Environmental Protection Agency, answer the following interrogatories of plaintiffs Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, and National Parks and Conservation Association as follows:

* * * *

18. Did the Administrator complete a review of the National Ambient Air Quality Standards for sulfur oxides by December 31, 1985, or any date subsequent thereto?

    Yes; the Administrator and Agency staff have been conducting a continuous and thorough going review of the scientific and technical aspects of the SO_2 standards, since before 1980. The results of that review, which incorporated the findings and recommendations

of the Clean Air Scientific Advisory Committee, were communicated to the Administrator in written summary, briefing materials, and oral presentations. In the case of William Ruckelshaus, this review process was completed by June 1984. Subsequently, the current Administrator Lee Thomas, initiated another review of the SO_2 standards and has received a number of briefings on those standards. This review was completed in January 1986.

18a. If the answer to 18 is "YES," state the conclusions of that review. Please identify all documents in which those conclusions are set out.

In brief, this continuous process of review of the SO2 standards has resulted in the following provisional conclusions: 1) The current SO2 standards provide substantial protection against the direct effects on asthmatics; 2) Adding a new 1-hour standard would provide some incremental improvement in protection against short-term effects; 3) It is not appropriate, based on available information, to establish ambient standards for sulfur oxides to control acid deposition. These conclusions are subject to revision as the Agency continues to review the standards.

1. "Review of the National Ambient Air Quality Standards for Sulfur Oxides: Assessment of Scientific and Technical Information: OAPQS Staff Paper," EPA-450/5-82-007, November 1982.

2. Draft Federal Register Preambles—National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide), latest draft dated 9/11/84.

3. Memorandum—Subject: "Proposed Revisions to the Air Quality Standards for Sulfur Oxides—Action Memorandum," from Joseph A. Cannon to Milton Russell, dated 9/11/84.

4. Memorandum—Subject: "Region 9 Comments on Proposed Revisions to the NAAQS for Sulfur Oxides —SAR 1002," from David Howekemp to C. Ronald Smith, dated 10/22/84.

5. Memorandum—Subject: "Proposed Rule: NAAQS for Sulfur Oxides SAR 1002," from Randall F. Smith to C. Ronald Smith, dated 10/22/84.

6. Memorandum—Subject: "Regulation Review—NAAQS for Sulfur Oxides (SAR-1002)," from Valdas V. Adamkus to Odelia Funk, dated 10/10/84.

7. Memorandum—Subject: Region II Comments on Proposed NAAQS for Sulfur Oxides, from Herbert Barrack to C. Ronald Smith, dated 11/1/84.

8. Steering Committee Hand-out—"Issues Concerning the SO2 NAAQS Proposal Package," not dated.

9. Memorandum—Subject: Steering Committee Closure on Proposed NAAQS for Sulfur Oxides, from C. Ronald Smith to Gerald Emison, Joan LaRock, dated 2/19/85.

10. Memorandum (with Attachments)—Subject: "Sulfur Oxides Options Selection Meeting, April 16," from Joseph A. Cannon to Deputy Administrator, Assistant Administrators, General Counsel, Associate Administrator for Regional Operations, dated 4/3/84.

11. Memorandum and attachments—Subject: "Options Selection Meeting, April 16, 1984: Closure Memo for OAR's National Ambient Air Quality Standards for Sulfur Oxides," from Milton Russell to Deputy Administrators, Assistant Administrators, Associate Administrators, Regional Administrators, General Counsel, Inspector General, dated 5/8/84.

12. "Briefing Book"—Outlining Status of the Review of the National Ambient Air Quality Standards for Sulfur Oxides, not dated. Note briefing book originally

prepared Spring of 1984, updated through September of 1985 for Mr. Thomas.

13. Briefing charts on the review of sulfur oxides NAAQS for: 1) the Administrator on May 29, 1984, April 10, 1985, July 31, 1985, August 1, 1985, August 22, 1985, September 13, 1985, September 25, 1985, October 2, 1985, January 15, 1986; 2) the Deputy Administrator on January 13, 1984, February 29, 1984; 3) the Assistant Administrator for OAR on February 14, 1985, September 10, 1984; and 4) the Director, Office of Air Quality Planning and Standards, May 22, 1984.

14. Briefing Document for the Administrator (with Appendices) by The Acid Deposition Task Force, dated 8/1/83.

15. Memorandum—Subject: "Draft SO2 NAAQS Preamble," from John Bachmann to Bruce Jordan, dated 8/15/84.

16. Memorandum—Subject: "Draft SO2 NAAQS Preamble and Action Memorandum," from Gerald A. Emison to Joseph A. Cannon, dated 8/30/84.

17. Memorandum—Subject: "Review of Draft SO2 NAAQS Preamble," from John Bachmann to B. Bauman, A. Cristofaro, G. Gleason, L. Grant, T. Helms, H. McKinnon, V. Nazar, D. Patton, P. Stolpman, T. Yosie, dated 7/23/84.

18. Memorandum—Subject: "Review of National Ambient Air Quality Standards for Sulfur Oxides," from Joseph Padgett to Joseph Cannon, dated 11/10/83.

19. Memorandum—Subject: "Review of National Ambient Air Quality Standards for Sulfur Oxides," from Joseph A. Cannon to the Administrator, thru Deputy Administrator, dated 12/21/83.

20. Testimony by Lee Thomas, Administrator of EPA on Acid Deposition before the Committee on Environ-

ment and Public Works, U.S. Senate, December 11, 1985.

Documents 2-19 are privileged as predecisional documents comprising a part of the intra-agency deliberative process.

18b. If the answer to 18 is "Yes," has the Administrator, based on that review, published any determination or proposed determination as to whether revised or new Primary National Ambient Air Quality Standards are appropriate? If so, identify such publication.

No.

* * * *

Dated: March 6, 1986

Respectfully submitted,

/s/ Michael A. McCord
MICHAEL A. MCCORD
Attorney
Environmental Defense Section
Land and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 633-3468 FTS 633-3468

/s/ Earl Salo
EARL SALO
Attorney
Office of General Counsel
Air and Radiation Division (LE-132A)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460
(202) 382-7632

No. 89-373 (3)

IN THE

Supreme Court of the United States

October Term, 1989

ALABAMA POWER COMPANY, *et al.*,

Petitioners,

against

ENVIRONMENTAL DEFENSE FUND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

ROBERT ABRAMS
Attorney General of New York

O. PETER SHERWOOD*
Solicitor General
PETER H. SCHIFF
Deputy Solicitor General
DAVID R. WOOLEY
DOUGLAS H. WARD
JOAN LEARY MATTHEWS
Assistant Attorneys General
New York State Department of Law
The Capitol
Albany, New York 12224
(518) 474-4819

ROBERT E. YUHNKE
JAMES T. B. TRIPP
Attorneys for Environmental Defense Fund

DAVID HAWKINS
Attorney for Natural Resources Defense Council

JOHN P. ARNOLD
Attorney General of New Hampshire

JEFFREY L. AMESTOY
Attorney General of Vermont

CLARINE NARDI RIDDLE
Acting Attorney General of Connecticut

JAMES M. SHANNON
Attorney General of Massachusetts

HUBERT H. HUMPHREY, III
Attorney General of Minnesota

HOWARD FOX
Attorney for Sierra Club and the National Parks and Conservation Association

*Counsel of Record

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1989
(3393)

24pp

Questions Presented

1. Whether the court below exceeded its jurisdiction under § 304 of the Clean Air Act by ordering the Agency to make a decision on whether to revise a national air quality standard in accordance with a statutory requirement that it do so at five year intervals.

2. Whether the court below imposed procedures beyond those required by statute where, in advance of the court's ruling, the Agency voluntarily undertook notice and comment procedures.

Table of Contents

TABLE OF AUTHORITIES

Page

FEDERAL STATUTES

FEDERAL REGULATIONS

Page

MISCELLANEOUS

No. 89-373

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ALABAMA POWER COMPANY, *et al.*,

Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Statement of the Case

This case arises under §§ 109 and 304 of the federal Clean Air Act ("Act"). 42 U.S.C. §§ 7409, 7604. Seven states and four national citizen groups ("respondents") filed a § 304 "citizen suit" against the Administrator of the Environmental Protection Agency ("EPA"), seeking an order requiring him to revise the secondary National Ambient Air Quality Standard ("standard" or "NAAQS") for the

pollutant sulfur oxides ("SO_x") or promulgate a new standard for the pollutant sulfate (which is one of the oxides of sulfur), or, in the alternative, require the Administrator to conduct a rulemaking to determine whether the NAAQS should be revised.

Respondents sought to enforce non-discretionary duties imposed on the Administrator of the U.S. Environmental Protection Agency by § 109. Subsections 109(b)(1) and (2) direct that NAAQS be set at the levels requisite to protect public health with an ample margin of safety and to protect the environment from all adverse effects of sulfur oxide emissions.

The statutory provisions at issue were enacted in 1970 and amended in 1977. In 1970, Congress completely overhauled the nation's Clean Air Act legislation, "to provide a much more intensive and comprehensive attack on air pollution," which it acknowledged as a "critical and growing national problem." S. Rep. No. 1196, 91st Cong., 2d Sess. 4 (1970) (hereinafter "1970 Senate Report"). One purpose of the legislation was to "sharply increase federal authority and responsibility in the continuing effort to combat air pollution." *Train v. Natural Resources Defense Council,* 421 U.S. 60, 63-64 (1976). The 1970 amendments reflected Congress' dissatisfaction with progress under pre-existing air pollution laws and were a "drastic remedy" to what was perceived as a "serious and otherwise uncheckable problem." *Union Electric Co. v. Environmental Protection Agency,* 427 U.S. 246, 249, 256 (1976).

An additional purpose of the 1970 Act was to "expedite the establishment and implementation of air quality stand-

ards," which prior law had failed to accomplish. 1970 Senate Report at 1, 10.[1]

Once the Administrator determines that an air pollutant (or class of pollutants) "may reasonably be anticipated to endanger public health or welfare," the Act requires him to place it on a list of regulated pollutants and to develop Air Quality Criteria ("Criteria"). 42 U.S.C. § 7408(a)(1)(A). The listing of the pollutant and the development of the Criteria are the first steps leading to establishment of National Ambient Air Quality Standards for that pollutant.[2] 42 U.S.C. § 7408(a)(2). The Air Quality Criteria must "reflect the latest scientific knowledge" and "all identifiable effects on public health and welfare" from the pollutant. *Id.* The national standards are required to be "based on" the Criteria. 42 U.S.C. § 7409(b)(2).[3]

---

[1]Before 1970, the states had responsibility to set air quality standards "on the basis of criteria set forth by the secretary [HEW]." H.R. Rep. No. 1146, 91st Cong., 1st Sess. 1-2, *reprinted in* 1970 U.S. Code Cong. and Admin. News 5356-57. With the passage of the 1970 amendments, Congress imposed upon the Administrator the duty to set the national standards. 42 U.S.C. § 7409(a).

[2]The NAAQS are variously described as the "heart" or "cornerstone" of the Act. *Train v. NRDC, supra,* 421 U.S. at 66; testimony of Administrator Russell Train to the Subcommittee on Health and Environment, March, 1975, *reprinted in* 8 A Legislative History of the Clean Air Act Amendments of 1977, at 7190 (1979). The standards are expressed as a limitation on the concentration of a pollutant or pollutant class in the ambient air. *See,* 42 C.F.R. §§ 50.4, 50.5. The setting of a national standard triggers obligations upon the states to develop and implement air pollution control plans designed to achieve the standards. 42 U.S.C. § 7410(a)(2)

[3]Section 109(a)(1) of the 1970 Act directed EPA to publish proposed regulations prescribing national "primary" and "secondary" ambient air quality standards for each pollutant for which Air Quality Criteria has been issued under prior law. 42 U.S.C. § 7409(a)(1). At issue in this appeal is the National Secondary Ambient Air Quality Standard relating to the pollutant class known an sulfur oxides, for which EPA first issued Air Quality Criteria in 1969, and revised Criteria in 1982 and 1984.

The Act states that in establishing any secondary standard the EPA Administrator:

> . . . *shall* specify a level of air quality the attainment and maintenance of which in the judgment of the administrator, based on such criteria, is requisite to protect the public welfare from *any* known or anticipated adverse affects associated with the presence of such air pollution in the ambient air.

42 U.S.C. § 7409(b)(2) (emphasis added). The Act defines the term "welfare" to include all conceivable effects of a pollutant on the natural and manmade environments. 42 U.S.C. § 7602(h).

The 1970 Act did not impose a schedule for revision of the standards to account for improved knowledge of the effects of the pollutant. It did, however, require EPA to revise the Criteria from time to time, 42 U.S.C. § 7408(c).

The absence of a regular schedule for reviewing, and if appropriate, revising the standards was recognized as a defect at the time of the 1977 Clean Air Act amendments.[4] Consequently, § 109(d)(1) was added. This subsection requires review and revision of the standards every five years.

> Not later than December 31, 1980, and at five year intervals thereafter the Administrator *shall* complete the thorough review of the criteria published under § 7408 of this title and the national

[4]H.R. Rep. No. 294, 95th Cong., 1st Sess., 10, 182, 338-339, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 1088, 1261, 2805-6; Senate Rep. No. 127, 95th Cong., 1st Sess. 16, *reprinted in* Congressional Research Service, A Legislative History of the Clean Air Act Amendments of 1977, Vol. 3 at 1390; H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess., 124 *reprinted in* 1977 U.S. Code Cong. & Admin. News at 1505.

> ambient air quality standards promulgated under this section and *shall* make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The administrator may review and revise criteria or promulgate new standards earlier or more frequently than *required* under this paragraph.

42 U.S.C. § 7409(d)(1) (emphasis added).

EPA established the national standards for sulfur oxides in 1971 and has not revised them since then, except to delete the secondary standard in 1973.[5] *See,* opinion of the Court of Appeals, reprinted in the Appendix, at 6a (hereinafter referred to as "App. ____"). App. 4a, 6a, 7a. The 1971 standards expressly were not established to protect against the acid rain and regional, haze effects of sulfur oxides. App. 4a, 6a-7a.

To comply with the 1977 amendments to § 109, EPA should have completed review and made a decision on whether to revise the sulfur oxides standards in 1980 and 1985 and be preparing for a third round in 1990. Contrary to the statements in the petition, EPA has never made any formal decision on whether to revise the standards. EPA did not complete first review of the sulfur oxide standards until 1982 when it published its revised criteria documents.

---

[5]Sulfur oxides were the subject of a Criteria document issued by the Secretary of HEW (the predecessor of the Administrator) in 1969. At the direction of Congress in § 109(a)(1), EPA set National Ambient Air Quality Standards for sulfur oxides in 1971, which were thereafter revised in 1973. 42 U.S.C. § 7408(a)(1); 36 Fed. Reg. 1502 (January 30, 1971); 38 Fed. Reg. 25679 (September 6, 1973).

The Administrator revised the air quality Criteria for sulfur oxides in 1982 and again in 1984. He did not, however, publish any proposed action with regard to the sulfur oxides national standards at that time. *See,* 42 U.S.C. § 7409(a)(2). Thus, the national standards for sulfur oxides have not been revised for sixteen years.

Those documents identified acid rain and regional haze conditions as adverse environmental effects of sulfur oxide emissions. Nevertheless, EPA failed to revise the standards to address these effects.[6]

Since 1970, Congress has empowered district courts (upon commencement of the civil action by any person) to order the Administrator to "perform any act or duty under this chapter which is not discretionary with the Administrator . . ." 42 U.S.C. § 7604. The right to bring a citizen suit in district court to compel EPA action under § 304 is distinct from the right to seek judicial review of agency action. The right of judicial review is provided in § 307 which grants to the Court of Appeals power to review

> . . . promulgation of any national primary or secondary air quality standard . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter . . .

42 U.S.C. § 7607(b)(1). This case seeks performance of the Administrator's duty to set a secondary standard to protect against adverse effects on the environment not previously addressed by the Administrator under the Act. Plaintiffs

[6]In its review of the particulate matter standard, EPA specifically identified visibility impairment and acid rain as adverse effects of sulfur dioxide and its chemical derivative, sulfate particles. 52 Fed. Reg. 24646, 24670 (July 1, 1987). The statement to the contrary in the petition is flatly wrong. *See, Alabama Power* petition at 6, note 16. EPA's refusal to set a standard for these effects in that rulemaking was not based on an inability to decide whether visibility was an adverse effect of sulfur oxide emissions. Rather, it was based on the Agency's choice of regulatory timing in dealing with visibility effects and on an alleged inability to devise a standard to address acid rain. An appeal of that final EPA decision is pending in the U.S. Court of Appeals for the D.C. Circuit in *NRDC v. Thomas*, Case No. 87-1438 (oral argument scheduled for December 14, 1989).

below did not seek review of any final agency action since the Administrator had not taken any action with regard to these adverse effects.

Decisions Below

On April 19, 1988 the district court (Edelstein, J.) dismissed the action (on cross motions for summary judgment) finding that it lacked subject matter jurisdiction because the Administrator had no non-discretionary duty under § 109 to revise the national standard for sulfur oxides to protect the environment. *Environmental Defense Fund v. Thomas,* No. 85-CV-9507 (S.D.N.Y., April 19, 1988).

Judge Edelstein ruled that § 109 imposes a non-discretionary duty on the Administrator to "review" the standards at five year intervals—but no duty to revise them "even if the EPA had found the existing standards inadequate," because revision of the standards involves an exercise of discretion and expert judgment. App. 38a. The court concluded that, pursuant to § 307, any challenge to the failure of the Administrator to set national standards must be presented to the United States Court of Appeals for the District of Columbia Circuit. App. 38a.

On appeal, the Second Circuit reversed in part and affirmed in part. *Environmental Defense Fund v. Thomas,* 870 F.2d 892 (2d Cir. 1989). The court rejected EPA's argument and the holding of the district court that EPA may "stand pat, deciding neither to revise the NAAQS or to make a public decision that revision is necessary." App. 9a. In reversing the district court, it held that § 109(d) imposed a nondiscretionary duty upon the EPA Administrator to make *some* decision regarding revision of the NAAQS." App. 9a, 18a (emphasis in original). The court further held

that enforcement of that non-discretionary duty lies in the district court under § 304.

The Second Circuit affirmed the district court's refusal to order EPA specifically to revise the national standard for sulfur oxides to protect against acid rain and visibility effects. It held that, "The substance of the Administrator's decision is beyond the power of the district court, . . . its authority being limited to ordering the Administrator to make a formal decision." App. 9a.

Central to the court's holding that EPA has a nondiscretionary duty to make *some* decision are the "shall" language and deadlines imposed upon the Administrator in § 109(d). App. 6a, 17a. The Second Circuit found that the Congressional intent on this matter was "clear." App. 17a. To hold that this claim did not fall within the citizen suit provision of § 304 would, the court said, "[leave] the matter in bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court." App. 17a. Such a result, the court reasoned, could not be countenanced:

> No discernible congressional purpose is served by creating such a bureaucratic twilight zone, in which many of the Act's purposes might become subject to evasion.

App. 17a. Thus, the Second Circuit ordered the Administrator to complete the notice and comment procedures he voluntarily undertook nearly a year before the Court of Appeals decision. *See,* 53 Fed. Reg. 14926 (April 26, 1988). The Second Circuit recognized that without such an order there would be no assurance that the Administrator would reach a final decision, thereby frustrating the Congressional purpose to protect public health and welfare from air pollution.

ARGUMENT

I.

THE DECISION OF THE SECOND CIRCUIT DOES NOT CREATE A CONFLICT WITH ANY DECISIONS OF THIS COURT OR OTHER CIRCUITS.

Petitioners claim that the decision of the court below is in conflict with this Court's decision in *Vermont Yankee Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519 (1978), and the decisions of the D.C. Circuit in *Oljato Chapter of the Navajo Tribe v. Train,* 515 F.2d 654 (D.C. Cir. 1975), and *Telecommunications Research and Action Center v. FCC,* ("TRAC"), 750 F.2d 70 (D.C. Cir. 1984). These claims are meritless.

A. There Is No Conflict With *Vermont Yankee* Because the Court Below Did Not Impose Procedures On the Administrator.

Petitioners complain that the court below ordered the Administrator to undertake rulemaking procedures in fulfilling his obligation to take some formal action regarding the NAAQS for SO_x. Petitioners claim that this "imposition" runs afoul of this court's decision in *Vermont Yankee* which prohibits courts from imposing procedural requirements on an agency in excess of those imposed by statute. 435 U.S. at 547-548. Petitioners' claim is based on a factual misstatement.

In this case, it was the Administrator, not the Second Circuit, who determined that notice and comment rulemaking procedures were appropriate. One week following the district court's decision dismissing the plaintiff's action (Edelstein, J.) the EPA Administrator published a "Proposed Decision Not to Revise the National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide)"

in the Federal Register (53 Fed Reg 14926 [April 26, 1988]) and invited comments on the proposal from the public.

Furthermore, § 307 of the Clean Air Act specifically empowers EPA to adopt notice and comment procedures for this type of decision. The rulemaking procedures of § 307 apply to "the promulgation or revision of any national ambient air quality standard under section 109 . . ." and "such other actions as the Administrator may determine." 42 U.S.C. § 7607(d)(1)(A) and (N). The Administrator chose to publish his proposed decision in an informal rulemaking proceeding either because he felt that § 307(d)(1)(A) required it, or because he determined that it was appropriate to proceed in that fashion pursuant to § 307(d)(1)(N). The Second Circuit merely ordered the Administrator to make a final decision in the administrative process which he voluntarily commenced. Therefore, the decision of the Second Circuit decision is not inconsistent with *Vermont Yankee.*[7]

Alabama Power makes the absurd claim that the Second Circuit decision requires agencies to engage in a continuous "multitude" of rulemaking proceedings as it reviews evolving scientific information. Petition at 11, 14, 23. The Second Circuit determination does not have this effect. It merely enforces the § 109 requirement that EPA make a

[7]Contrary to petitioners' assertion, a final decision not to revise a NAAQS falls within the definition of a "rule" under the Administrative Procedures Act and can only be determined by way of rulemaking procedures. The decision not to revise the obsolete 1971 standards "jeopardizes the rights and interests" of the members of the public. *Environmental Defense Fund v. Gorsuch,* 713 F.2d 802, 815 (D.C. Cir. 1983). Retention of the existing standards has "general" and "particular applicability and future effect" because it guides the behavior of EPA and thousands of industrial air pollution sources for up to five years. Thus, it is a rule under 5 U.S.C. §551(4). But this issue was not before the Second Circuit. Nor is it properly before this Court, since EPA has already chosen to publish the proposed decision as a rule.

formal decision on whether to revise the standards, *every five years*. The Second Circuit did not usurp the Administrator's discretion by dictating when EPA should issue such decisions. Rather, Congress set the schedule in § 109 and empowered district courts to enforce it in § 304. 42 U.S.C. §§ 7409, 7604.

B. Unlike the Situation in *Oljato*, This Case Involves EPA's Failure To Perform a Non-Discretionary Duty Under the Clean Air Act.

Petitioners contend that the decision below conflicts with the decision of the D.C. Circuit in *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975). Specifically, petitioners argue that respondents should have petitioned the agency for rulemaking to revise the NAAQS for SO_x, thereby resulting in the establishment of an administrative record for subsequent review by the D.C. Circuit. Petitioners' assertion, as the Second Circuit properly found, ignores the fundamental difference between the Agency's statutory duties in *Oljato* and the instant case. App. 10a, App. 11a.

The plaintiffs in *Oljato* sought review of whether EPA should exercise discretionary powers under § 111(b) of the Clean Air Act, which provided that EPA "may, from time to time, revise" the performance standards at issue there. 42 U.S.C. § 7411(b); App. 10a. Pursuant to § 307 of the Clean Air Act, such discretionary duties may only be reviewed by the D.C. Circuit following the Agency's action upon a petition for rulemaking. By contrast, in the instant case, plaintiffs sought relief under § 109(d) of the Clean Air Act which provides that the Administrator *"shall"* review and revise (at five year intervals) the criteria and standards published under §§ 108 and 109. 42 U.S.C. 7409(d). Pursuant to Clean Air Act § 304, a citizen suit to compel this

non-discretionary duty is expressly available in the district courts.

Thus, the outcome in *Oljato* was dictated by the fact that the statute did not impose a non-discretionary duty. It was the absence of such a duty which deprived the district court of jurisdiction under § 304. Moreover, as the court below found,

> Since *Oljato*, . . . the District of Columbia Court has distinguished between those revision provisions in the Act that include stated deadlines and those that do not, holding that revision provisions that do include stated deadlines should, as a rule, be construed as creating non-discretionary duties. *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987).

App. 10a. Since *Oljato* has no application to this case, there is no conflict between the two circuits which would warrant review by this Court.

C. The *TRAC* Decision is Inapplicable Here Because the Clean Air Act Contains a Citizen Suit Provision Which Specifically Assigns District Court Jurisdiction To Enforce EPA's Statutory Obligations.

Petitioners argue that the decision below conflicts with yet another decision of the D.C. Circuit, *Telecommunications Research and Action Center v. FCC ("TRAC")*, 750 F.2d 70 (D.C. Cir. 1984), which held that "any suit seeking relief that might affect the Circuit Court's future jurisdiction [to review agency actions] is subject to the *exclusive* review of the court of appeals." This purported conflict is not present here because the statutory schemes in *TRAC* and the instant case are markedly different.

In *TRAC*, petitioners sought review directly in the D.C. Circuit to compel FCC action on an administrative petition which the FCC failed to rule on after a five year delay. The statute before the court of appeals in *TRAC*, however, specifically gave the court of appeals exclusive jurisdiction as to final orders of the FCC, but did not address what court had jurisdiction over Agency delay or failure to take action required by law. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). The D.C. Circuit held that it alone had jurisdiction over "claims of unreasonable Commission delay." 750 F.2d at 76.

In stark contrast, the Clean Air Act provides for a bifurcated system of judicial review. The forum varies between the district court and the court of appeals depending upon whether the statute makes EPA action discretionary or nondiscretionary. Under § 304 of the Clean Air Act, Congress expressly gave the district courts jurisdiction to issue orders compelling the EPA Administrator to perform mandatory duties.

The Clean Air Act gives the courts of appeals jurisdiction to review final orders and regulations issued by EPA Administrator. 42 U.S.C. § 7607(b) (1982). This authorizes judicial review of virtually all final action that the Administrator has a mandatory duty to undertake. But, where the Agency has failed to act, enforcement of EPA's mandatory duties in the first instance is left exclusively to the district courts, by the plain terms of § 304(a)(2).

Consequently, the reasoning employed in TRAC—that Congress had "manifested an intent" that the courts of appeals should have exclusive jurisdiction over all suits to compel agency action—is inapplicable to a statute such as the Clean Air Act which carves out a distinct jurisdictional function for the district court. Under the Clean Air Act,

Congress has clearly manifested an intent that the district courts have jurisdiction over suits seeking to compel the Administrator of EPA to perform a mandatory duty. App. 8a, 16a-17a.

Finally, the Environmental Protection Agency agrees with this interpretation of § 304 and the *TRAC* decision. In a brief filed in other litigation, EPA rejected a similar argument advanced by the same parties who filed the petition in this proceeding. The District Court there agreed.

> The review of the failure to perform a nondiscretionary act [under the Clean Air Act] is vested in the district court under § 304. The EPA, which argues contrary to intervenors with respect to this issue, argues in its surreply that intervenors 'can only read *TRAC* into this case by reading § 304 out of the Clean Act.'

State of New York v. Thomas, 613 F. 2d 1472, 1478 (D.D.C. 1985), *rev'd on other grounds,* 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied,* 482 U.S. 919 (1987). The same is true in this case, and petitioners' once failed *TRAC* claim should again be rejected.

CONCLUSION.

The Writ should be denied.

Dated: October 5, 1989

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York

O. PETER SHERWOOD
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General
DAVID R. WOOLEY
DOUGLAS H. WARD
JOAN LEARY MATTHEWS
Assistant Attorneys General
New York State Department
of Law
The Capitol
Albany, New York 12224
(518) 474-4819

ROBERT E. YUHNKE
Environmental Defense Fund
1405 Arapahoe Avenue
Boulder, Colorado 80302
(303) 449-4901

JAMES T.B. TRIPP
Environmental Defense Fund
257 Park Avenue South
New York, New York 10010
(212) 505-2100

Counsel for Environmental
Defense Fund

CLARINE NARDI RIDDLE
Acting Attorney General of the
State of Connecticut
BRIAN COMERFORD
Assistant Attorney General
State of Connecticut
State Office Building
Room 147
Hartford, Connecticut 06106
(203) 566-7213

JOHN P. ARNOLD
Attorney General of the State
of New Hampshire
GEORGE DANA BISBEE
CHARLES B. HOLTMAN
Assistant Attorneys General
Environmental Protection
Division
State of New Hampshire
State House Annex
25 Capitol Street
Concord, New Hampshire 03301
(603) 271-3679

JAMES M. SHANNON
Attorney General of the State
of Massachusetts
ALLAN FIERCE
Assistant Attorney General
Commonwealth of Massachusetts
One Ashburton Place, 19th Floor
Boston, Massachusetts 02108
(617) 727-2265

JEFFREY L. AMESTOY
Attorney General of the State
of Vermont
J. WALLACE MALLEY, JR.
Assistant Attorney General
State of Vermont
Office of the Attorney General
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

HUBERT H. HUMPHREY, III
Attorney General of the State
of Minnesota
ELDON G. KAUL
ANN SEHA
Special Assistant Attorneys
General
520 Lafayette Road
Suite 200
St. Paul, Minnesota 55155
(612) 297-1075

DAVID HAWKINS
Natural Resources Defense
Council
1350 New York Avenue, N.W.
Suite 300
Washington, D.C. 20005
(202) 783-7800

HOWARD FOX
Attorney for Respondents
Sierra Club and National
Parks and Conservation
Association
Sierra Club Legal Defense Fund
1516 P Street, N.W.
Suite 300
Washington, D.C. 20005
(202) 667-4500

November 6, 1989

No. 89-373

In the Supreme Court of the United States

OCTOBER TERM, 1989

ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

ENVIRONMENTAL DEFENSE FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL. IN OPPOSITION

KENNETH W. STARR
Solicitor General
RICHARD B. STEWART
Assistant Attorney General
ROBERT L. KLARQUIST
JACQUES B. GELIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GERALD K. GLEASON
Office of the General Counsel
Environmental Protection Agency
Washington, D.C. 10460

QUESTION PRESENTED

Whether 42 U.S.C. 7409(d)(1) imposes a non-discretionary duty on the Administrator of the Environmental Protection Agency to engage in notice and comment rulemaking before deciding not to revise national ambient air quality standards for sulfur oxides.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-373

ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

ENVIRONMENTAL DEFENSE FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL. IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-21a, is reported at 870 F.2d 892. The opinion of the district court, Pet. App. 22a-45a, is unreported.

JURISDICTION

The judgment of the court of appeals, Pet. App. 48a, was entered on March 22, 1989. A petition for rehearing was denied on June 8, 1989. Pet. App. 49a. The petition for a writ of certiorari was filed on September 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Seven states and four environmental groups brought suit in the United States District Court for the Southern District of New York to compel the Administrator of the Environmental Protection Agency to revise the national ambient air quality standards (NAAQS) for sulfur oxides. The district court dismissed the suit for lack of subject matter jurisdiction. The court of appeals reversed on the ground that the district court had jurisdiction "to compel the Administrator to take some formal action, employing rulemaking procedures * * * either revising the NAAQS or declining to revise them." Pet. App. 18a. The court of appeals accordingly remanded the case to the district court.

1. The states and environmental groups brought a "citizen suit[]" in the district court under 42 U.S.C. 7604, Pet. App. 24a, which provides that "any person may commence a civil action on his own behalf * * * against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this [Act] which is not discretionary with the Administrator." The states and environmental groups contended that the Administrator had a non-discretionary duty under 42 U.S.C. 7409(d)(1) to revise the national ambient air quality standards for sulfur oxides.

The district court dismissed the complaint for lack of subject matter jurisdiction. Pet. App. 43a, 45a. In the court's view, the mandatory language of Section 7409(d)(1) imposes a non-discretionary duty on the Administrator to *review* periodically the air quality standards governing sulfur oxides. At the same time, however, the court reasoned that the permissive language of that Section applicable to *revisions* of air quality standards means that the Administrator has discretion not to revise those standards. Section 7409(d)(1) provides:

> Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator *shall* complete a thorough *review* of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and *shall* make such *revisions* in such criteria and standards and promulgate such new standards *as may be appropriate* in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

42 U.S.C. 7409(d)(1) (emphasis added). By providing that the Administrator shall make such revisions "as may be appropriate," the district court explained, Section 7409(d)(1) entrusts revision of the sulfur oxides standards to the Administrator's sound discretion. First, the qualifying term "may" indicates that the Administrator's authority is permissive. Pet. App. 32a (citing *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947)). Second, the determination of what is appropriate "clearly calls for the exercise of discretion and expert judgment." Pet. App. 32a. Accordingly, the district court "reject[ed] the proposition that [the Administrator was] under a nondiscretionary duty to revise the standards for sulfur oxides." *Id.* at 34a & n.5.

2. A divided panel of the court of appeals reversed and remanded. The majority agreed with the district court that "[t]he words 'as may be appropriate' clearly suggest that the Administrator must exercise judgment" under Section 7409(d)(1). Pet. App. 14a. But the majority also held that "the presence of 'shall' in the section implies * * * that the district court has jurisdiction to order the Administrator to make *some* formal decision whether to revise the NAAQS, the content of that decision being within the Administrator's discretion." *Ibid.* See *id.* at 12a-14a, 17a-18a.

One week after the district court's decision, the Administrator had published a "Proposed Decision not to Revise the National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide)," 53 Fed. Reg. 14,926 (1988), and invited public comment. In light of the Administrator's notice of proposed rulemaking, the court of appeals remanded "so the district court can enter an order directing the Administrator to continue the rulemaking to formal decision." Pet. App. 18a.

Judge Mahoney dissented. In his view, the requirement in Section 7409(d)(1) that the Administrator "shall" make revisions "as may be appropriate" does not impose a date-certain deadline by which time all specified agency action must be completed so as to impose a non-discretionary duty of timeliness under *Sierra Club* v. *Thomas*, 828 F.2d 783 (D.C. Cir. 1987). Pet. App. 20a. Because of the lack of a non-discretionary duty, he reasoned, the district court did not have subject matter jurisdiction under the "citizens suit" provision. 42 U.S.C. 7604. Only the Court of Appeals for the District of Columbia Circuit would have jurisdiction over the sulfur oxides standards on review of a rule promulgation or other "final action" by the Administrator. 42 U.S.C. 7607(b). Judge Mahoney therefore concluded that this case falls within the rule of *Telecommunications Research & Action Center* v. *FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984), which held that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Circuit Court of Appeals." Pet. App. 21a.

Judge Mahoney emphasized that dismissing the suit for lack of subject matter jurisdiction would not create a "bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court." Pet. App. 19a. The states and environmental groups could

have invoked the procedure outlined in *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975), under which they would have petitioned EPA for revision of the sulfur oxides standards. If the Administrator denied their petition, the states and environmental groups could have sought review of that "final action" in the Court of Appeals for the District of Columbia Circuit under 42 U.S.C. 7607(b).

ARGUMENT

1. We agree with petitioners that the court of appeals' decision is in error. As the district court and Judge Mahoney correctly observed, 42 U.S.C. 7409 requires the Administrator to *review* national ambient air quality standards periodically, but it does not impose a nondiscretionary duty to *revise* such standards that would be enforceable in a "citizens suit" brought by the states and environmental groups in this case.

Although Section 7409(d)(1) does not impose a nondiscretionary duty to revise national ambient air quality standards, the states and environmental groups could have petitioned the Administrator to revise the sulfur oxides standards under the procedure outlined in *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975). We disagree with the panel majority's characterization of the *Oljato* procedure as "dictum" that was made "obsolete" by the 1977 amendments to the Clean Air Act, 42 U.S.C. 7401 *et seq.* Pet. App. 11a n.1. The majority's disparagement of *Oljato* is inconsistent with the Second Circuit's earlier decision in *New England Legal Foundation* v. *Costle*, 666 F.2d 30, 33 (2d Cir. 1981), and with the decisions of other courts of appeals that have explicitly approved the *Oljato* procedure subsequent to the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, see Pet. 21.

2. The court of appeals' decision nevertheless does not warrant further review because it is unlikely to have a significantly adverse effect on EPA's procedures and because there is no conflict among the lower courts on the precise question presented in this case.

a. It would be premature to conclude that the court of appeals' decision will have a significant impact on EPA's implementation of 42 U.S.C. 7409. EPA's current practice under that Section is to initiate a rulemaking and solicit public comment on proposed decisions not to revise national ambient air quality standards. See, *e.g.*, 49 Fed. Reg. 6,866 (1984) (nitrogen dioxide); 45 Fed. Reg. 55,066 (1980) (carbon monoxide); 43 Fed. Reg. 26,962 (1978) (ozone). The court of appeals' erroneous interpretation of Section 7409(d)(1) to impose this same requirement will therefore not disrupt agency decisionmaking at this time.[1]

Significantly, the court of appeals correctly recognized that the Administrator has discretion whether to revise national ambient air quality standards and how they should be revised. The court unequivocally rejected the contention by the states and environmental groups that the Clean Air Act requires the Administrator to revise the sulfur oxides standards and instead recognized that Congress has entrusted that decision to the Administrator's sound discretion. Petitioners' assertion that the panel majority authorized district courts to "review scientific data and order the Agency to engage in rulemaking based on the results of that review" is thus inaccurate. Pet. 9. Indeed, the Second Circuit's subsequent decision in *Natural Resources Defense Council, Inc.* v. *Thomas*, No. 88-6210 (Sept. 18, 1989), slip

[1] Should the reasoning of the panel majority be applied to require rulemaking under a comparable statute where an agency had not independently decided to solicit public comment on a proposed decision not to take a particular action, review by this Court might be appropriate.

op. 5716, confirms that the decision below does not "authorize any action on our part to direct the substance, rather than the timing, of the Administrator's action, as NRDC here seeks." The court of appeals' decision thus affirms the Administrator's discretion to decide whether and when new scientific information warrants revision of air quality standards.[2]

b. Nor does the court of appeals' decision directly conflict with this Court's decisions in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). We agree with petitioners that the court of appeals should have deferred to the Administrator's construction of Section 7409(d)(1) and that that Section imposes no requirement that the Administrator formally decide whether to revise air quality standards. Cf. Pet. 16-17 & n.52. But the court of appeals' failure to give appropriate deference and its erroneous imposition of a formal decision requirement at most simply misapplies the legal standards in *Chevron* and *Vermont Yankee*. Not every misapplication of a legal standard articulated by this Court creates a conflict of decisions meriting this Court's review. On the precise issue that the court of appeals decided here—whether Section 7409(d)(1) imposes a non-discretionary duty on the Administrator to make a formal decision whether or not to revise national ambient air quality standards—there is no conflict of decisions.

---

[2] Moreover, Congress is presently considering legislation to amend the Clean Air Act by specifically addressing the issue of acid rain. See, *e.g.*, H.R. 3030, S. 1490, and S. 57, 101st Cong., 1st Sess. (1989). This could result in a substantial change in the statute governing EPA's substantive duties in relation to sulfur oxides.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
RICHARD B. STEWART
Assistant Attorney General
ROBERT L. KLARQUIST
JACQUES B. GELIN
Attorneys

GERALD K. GLEASON
Office of the General Counsel
Environmental Protection Agency

NOVEMBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00593

No. 89-373

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ALABAMA POWER COMPANY, *et al.*,
Petitioners,
v.
ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONERS' REPLY BRIEF

GEORGE C. FREEMAN, JR.
HENRY V. NICKEL
(*Counsel of Record*)
MICHAEL L. TEAGUE
F. WILLIAM BROWNELL
NORMAN W. FICHTHORN
HUNTON & WILLIAMS
P.O. Box 19230
Washington, D.C. 20036
(202) 955-1500
Counsel for Petitioners
Alabama Power Company, et al.

November 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-373

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONERS' REPLY BRIEF

A divided panel of the Second Circuit held that the Environmental Protection Agency ("EPA") has a non-discretionary duty to conduct and complete "rulemaking" on whether or not to revise national ambient air quality standards for sulfur oxides under the Clean Air Act,[1] and that a district court has jurisdiction to enforce that purported duty under § 304(a)(2) of the Act.[2] The court made this holding notwithstanding the absence of anything in the Administrative Procedure Act[3] or the Clean

---

[1] 42 U.S.C. §§ 7401, *et seq.* (1982) (hereinafter "Act").

[2] *Id.* § 7604(a)(2); *see Environmental Defense Fund v. Thomas*, 870 F.2d 892, 894, 900 (2d Cir. 1989) (hereinafter "*EDF v. Thomas*"), App. 1a, 4a, 17a.

[3] 5 U.S.C. §§ 551, *et seq.* (1988) (hereinafter "APA").

Air Act requiring EPA—or any agency—to conduct "rulemaking" where it decides that rules need not be made. Moreover, in the absence of any statutory requirement that the agency conduct rulemaking, the court below failed to defer to the agency's construction of the Act and instead "simply impose[d] its own construction on the statute." [4]

In his brief in opposition, the Administrator agrees with petitioners that "the court of appeals' failure to give appropriate deference and its erroneous imposition of a formal decision requirement . . . misapplies the legal standards" announced by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council* [5] and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council.* [6] The Administrator asserts, however, that "[o]n the precise issue" decided below, "there is no conflict of decisions." [7]

The brief for respondents Environmental Defense Fund, *et al.* (hereinafter referred to collectively as "EDF"), however, makes plain the importance of the issues raised by the Second Circuit's decision and the conflict posed by that decision with basic administrative law principles applied by this Court and the other circuit courts of appeals. EDF argues that "a final decision *not*

---

[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

[5] *Supra* note 4.

[6] 435 U.S. 519 (1978); *see* Brief for the Administrator of the Environmental Protection Agency, *et al.* in Opposition, Nov. 1989, at 7 (hereinafter "EPA Brief"). Moreover, the Administrator agrees with petitioners that the Second Circuit's decision is "inconsistent" with decisions of other circuits because it holds that the plaintiffs in the present case were not required to seek an agency decision on their claims before they sought judicial intervention. EPA Brief at 5.

[7] EPA Brief at 7.

to revise a . . . [national ambient air quality standard] falls within the definition of a 'rule' under the Administrative Procedure Act and can *only* be determined by way of rulemaking procedures."[8] EDF argues that "[r]etention of the existing standards . . . is a rule" under the APA.[9] That is, the Second Circuit's decision, as construed by EDF, stands for the proposition that an agency determination to *retain* a rule must be subjected to the same procedures as an agency determination to *make* a rule. It is difficult to imagine a clearer contradiction of fundamental administrative law principles, the APA, and this Court's decision in *Vermont Yankee*.[10]

---

[8] Brief for Respondents in Opposition, Nov. 6, 1989, at 10 n.7 (hereinafter "EDF Brief") (emphasis added). EDF cites *Environmental Defense Fund v. Gorsuch*, 713 F.2d 802, 815 (D.C. Cir. 1983), *cited in* EDF Brief at 10 n.7. That case, however, required rulemaking where the agency sought to amend an existing rule. *See* 713 F.2d at 814-17, 818 (holding that the agency's suspension of the effective date of an existing rule was an attempt by the agency to promulgate a new rule). Here, in contrast, the agency has proposed *not* to amend existing rules, i.e., to keep the rules exactly as they are.

[9] EDF Brief at 10 n.7.

[10] EDF asserts that this issue was not before the Second Circuit and is not before this Court, on the grounds that when the Second Circuit issued its decision, EPA already had published a proposed decision not to revise the standards. *Id.* In addition, the Administrator suggests that "[i]t would be premature to conclude that" review by this Court is warranted, since "EPA's current practice . . . is to initiate a rulemaking and solicit public comment on proposed decisions not to revise national ambient air quality standards." EPA Brief at 6.

EDF and the Administrator misconstrue the nature of the question decided below and presented to this Court: Does a court have jurisdiction to *compel* an agency to conduct *and complete* a rulemaking—regardless of whether the agency has already published a proposed decision—where the agency intends to maintain the *status quo* and not to make or change a rule. Contrary to EDF's assertion, that is the very question decided below and presented here. Contrary to the Administrator's suggestion, there is no reason to

Further, EDF and the Administrator suggest that the decision below does not authorize district courts to review evolving scientific information and, on the basis of that review, to compel rulemaking.[11] The court below held, however, that scientific documents prepared by EPA "*triggered a* [*nondiscretionary*] *duty* on the part of EPA to address and decide whether and what kind of revision [to standards] is necessary." [12]

In addition, EDF is wrong in arguing that the decision below creates no conflict with the rule of preclusive court of appeals jurisdiction adopted by the District of Columbia Circuit in *Telecommunications Research and Action Center v. FCC* (*"TRAC"*)[13] and by the Ninth Circuit in an opinion by then-Judge Kennedy in *Public Utility Commissioner v. Bonneville Power Administration.*[14] EDF asserts that this rule is inapplicable here because "the Clean Air Act provides for a bifurcated system of judicial review." [15]

EDF ignores the D.C. Circuit's decision in *Sierra Club v. Thomas*, which held that the *TRAC* rule applies to

---

believe that that question would be more sharply drawn in a case where, as was the case when this proceeding was before the district court, the agency had not voluntarily published a proposed decision not to revise rules. A court has no more authority to compel completion of an agency proceeding already begun than it does to compel initiation of such a proceeding.

[11] *See* EDF Brief at 10-11; EPA Brief at 6.

[12] *EDF v. Thomas*, 870 F.2d at 900, App. 17a (emphasis added); *see also id.* at 896, App. 9a (duty exists "[i]n view of" EPA's scientific documents); *id.* at 901 n.2, App. 21a (majority's "in view of" statement creates *"the necessary implication* that [district] courts . . . will review, to some undetermined extent, the substance of discretionary decisions by the Administrator") (Mahoney, J., dissenting) (emphasis added).

[13] 750 F.2d 70, 75 (D.C. Cir. 1984).

[14] 767 F.2d 622, 626 (9th Cir. 1985).

[15] EDF Brief at 13.

cases under the Clean Air Act,[16] and that § 304(a)(2) jurisdiction exists only where the Act "'categorically'" mandates that the Administrator take a specified action by a date-certain deadline.[17] Because the Act does not mandate, categorically or otherwise, that EPA conduct and complete rulemaking on a decision to keep an air quality standard as it is, the Second Circuit's decision conflicts with the principles applied by the D.C. Circuit in *Sierra Club* and *TRAC* and the Ninth Circuit in *Public Utility Commissioner*.

As the above discussion shows, the Court should review the Second Circuit's decision because it conflicts with the principles of this Court's decisions and those of other circuits and with fundamental principles of administrative law. Moreover, the Court should review the decision because it establishes a precedent that will harm petitioners' interests in future litigation and may result in EPA's acquiescence in the Second Circuit's erroneous view of the law.

In addition, petitioners urge review because the decision below, if allowed to stand, will seriously jeopardize the interests of petitioners that are at stake in the present case. A decision by EPA to revise the air quality standards could result in much more stringent—and costly—emission limitations for electric utility power plants operated by petitioners and their member companies, as well as for facilities in many other industries. Such a decision would, in turn, be more likely if petitioners were denied a full opportunity to present information and arguments to EPA demonstrating why EPA should not

---

[16] *See Sierra Club v. Thomas*, 828 F.2d 783, 787-92 (D.C. Cir. 1987).

[17] *Id.* at 791 (quoting *Natural Resources Defense Council v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1975)).

revise the standards.[18] Because the Second Circuit's decision allows the district court to force EPA to end its proceeding prematurely, that decision may deny petitioners a full opportunity to convince EPA that revisions to the standards continue to be unwarranted.

Equally important, Congress is now considering amendments to the Clean Air Act that, if enacted, could greatly change the nature of the program for regulation of sulfur oxides and other substances under the Act.[19] A district court order compelling EPA to act on sulfur oxides while Congress is considering issues related to sulfur oxides regulation could result in precipitous administrative action adverse to petitioners' interests.

Respectfully submitted,

GEORGE C. FREEMAN, JR.
HENRY V. NICKEL
(Counsel of Record)
MICHAEL L. TEAGUE
F. WILLIAM BROWNELL
NORMAN W. FICHTHORN
HUNTON & WILLIAMS
P.O. Box 19230
Washington, D.C. 20036
(202) 955-1500
Counsel for Petitioners
Alabama Power Company, et al.

November 1989

---

[18] EPA has proposed not to revise the standards and has solicited public comments on that proposal, but has come to no conclusion on whether to make that proposal final.

[19] *See* EPA Brief at 7 n.2.